

3-2018

# Natural Resources and Natural Law Part I: Prior Appropriation

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## Recommended Citation

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# Natural Resources and Natural Law Part I: Prior Appropriation

Robert W. Adler\*

## *Abstract*

In recent years there has been a resurgence of civil disobedience over public land policy in the West, sometimes characterized by armed confrontations between ranchers and federal officials. This trend reflects renewed assertions that applicable positive law violates the natural rights (sometimes of purportedly divine origin) of ranchers and other land users, particularly under the prior appropriation doctrine and grounded in Lockean theories of property. At the same time, Native Americans and environmental activists on the opposite side of the political-environmental spectrum have also relied on civil disobedience to assert natural rights to a healthy environment, based on public trust and other principles. This article explores the legitimacy of natural law assertions that prior appropriation justifies private property rights in federal grazing resources. A companion article will evaluate the legitimacy of public trust and related assertions of natural law to support environmental protection.

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## **I. Introduction**

In recent years there has been a resurgence of civil disobedience to support natural law-based arguments regarding public lands and other resources. Some property rights advocates, particularly some western ranchers, rely in part on a form of natural law that might be characterized as rigidly prescriptive, and often theistic. Environmental advocates rely on public trust principles with potential origins in natural law.

Both groups raise fundamental questions about the extent to which land and other natural resources are public or private, their legitimate uses, or the protections they deserve. Reconciling the validity of these claims is deceptively difficult. Neither side can reject the claims of the other by asserting the invalidity of natural law *per se* to interpret or fill in gaps in positive law, without undercutting the validity of their own arguments.

This article focuses on the source and applicability of the prior appropriation doctrine to support claims by some western ranchers to

property rights in public grazing lands and resources.<sup>1</sup> It does not challenge the legitimacy of using civil disobedience to support those arguments. There is a long and noble history in the United States of using civil disobedience to protest government action or inaction, and to propose legal reform<sup>2</sup> based on alternative interpretations of law by discrete communities.<sup>3</sup> There is an important difference, however, between the legitimacy of civil disobedience as a tactic to advocate reform, and the legitimacy of the reforms sought.

#### A. Resurgence of Civil Disobedience

When an Oregon jury acquitted defendants in a federal prosecution for alleged offenses related to the armed occupation of the Malheur National Wildlife Refuge, defendant Shawna Cox proclaimed triumphantly that “we have God-given rights”<sup>4</sup> and “... I pray that [people] understand that God gives us rights, not the government. The government doesn’t have any

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<sup>1</sup> In a future article, I will evaluate the source and application of the public trust doctrine to support a range of new environmental protections.

<sup>2</sup> See, generally, See Bruce Ledewitz, *Civil Disobedience, Injunctions, and the First Amendment*, 19 HOFSTRA L. REV. 67, 141 (1990). There is, of course, a difference between nonviolent protest and the use of firearms, but that is also not my topic.

<sup>3</sup> See Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4, 50-53 (1983) (identifying willingness to endure the consequences of civil disobedience as a measure of commitment to alternative legal interpretations formed by discrete communities).

<sup>4</sup> Sophie June, *Bundy Supporters Celebrate with Shofar Performance*, WILLAMETTE WEEK (Oct. 27, 2016), <http://www.wweek.com/news/2016/10/27/bundy-supporters-celebrate-acquittal-with-a-shofar-performance/>. See, also, Leah Sottile, *Jury Acquits Ammon Bundy, Six Others for Standoff at Oregon Wildlife Refuge*, THE WASH. POST (Oct. 2016), [https://www.washingtonpost.com/news/post-nation/wp/2016/10/27/jury-acquits-leaders-of-armed-takeover-of-the-oregon-wildlife-refuge-of-federal-conspiracy-charges/?utm\\_term=.a153d1ddf745](https://www.washingtonpost.com/news/post-nation/wp/2016/10/27/jury-acquits-leaders-of-armed-takeover-of-the-oregon-wildlife-refuge-of-federal-conspiracy-charges/?utm_term=.a153d1ddf745) (reporting Ms. Cox to have said “Wake up America, and help us restore the Constitution.”)

rights.”<sup>5</sup> Her proclamation mirrors the views of ranchers in Nevada and elsewhere who dispute the validity of federal land control.<sup>6</sup>

Although the Malheur verdict might be explained as jury nullification,<sup>7</sup> the argument that one can overcome violations of federal criminal statutes by proclaiming God-given rights, or some other form of fundamental law, cannot be dismissed as the views of one lay defendant. Some Malheur defendants were convicted in a separate trial,<sup>8</sup> but a jury also acquitted some defendants prosecuted for the armed standoff with federal

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<sup>5</sup> Matthew Piper, *Jury Finds Defendants Not Guilty in Oregon Standoff*, THE SALT LAKE TRIBUNE (Oct. 27, 2016), <http://www.sltrib.com/home/4515803-155/jury-finds-defendants-not-guilty-of>. Ms. Cox was also seen praying with Utah State Senator Mike Noel before willfully violating federal restrictions on motorized vehicle use through federal land. See Christopher Smart, *Mike Noel Warned Utah Woman Arrested in Oregon Standoff Not to Go*, THE SALT LAKE TRIB. (Jan. 27, 2016), <http://www.sltrib.com/home/3467893-155/kanab-woman-arrested-in-oregon-standoff>.

<sup>6</sup> "Cliven Bundy says he doesn't recognize federal authority over public land where he said his family grazed cattle since the early 1900s. His dispute echoes a nearly half-century fight over public lands involving ranchers in Nevada and the West, where the federal government controls vast expanses of land." Ken Ritter, *2 in Nevada Standoff Case Take Plea Deals, Avoid 3rd Trial*, THE SALT LAKE TRIB., (Oct. 25, 2017), <http://www.sltrib.com/news/2017/10/24/2-in-nevada-standoff-case-take-plea-deals-avoid-3rd-trial/>.

<sup>7</sup> See generally, Darryl K. Brown, *Jury Nullification Within the Rule of Law*, 81 MINN. L. REV. 1149, 1150-52, 1160-1163 (1997) (defining jury nullification as “a jury’s ability to acquit a criminal defendant despite finding facts that leave no reasonable doubt about violation of a criminal statute,” and challenging the notion that nullification presumptively poses a threat to the rule of law). In the Malheur case, the defendants argued that they were merely protesting government overreach and posed no threat to government employees or the public. See Courtney Sherwood and Kirk Johnson, *Bundy Brothers Acquitted in Takeover of Oregon Wildlife Refuge*, N.Y. TIMES (Aug. 22, 2017), <https://www.nytimes.com/2016/10/28/us/bundy-brothers-acquitted-in-takeover-of-oregon-wildlife-refuge.html>.

<sup>8</sup> See Maxine Bernstein, *Two Convicted and Two Acquitted of Conspiracy in Oregon Occupation Trial*, THE OREGONIAN/OREGON LIVE, (Mar. 11, 2017), [http://www.oregonlive.com/oregon-standoff/2017/03/oregon\\_occupation\\_trial.html](http://www.oregonlive.com/oregon-standoff/2017/03/oregon_occupation_trial.html).

officials in Nevada<sup>9</sup> that later led to the Malheur protest.<sup>10</sup> Moreover, this was not the first time that western ranchers have used disobeyed positive law to protest or resist what they view as excessive federal control of their livestock and grazing lands.<sup>11</sup>

At the other side of the political-environmental spectrum, advocates have also resorted to civil disobedience recently to protest actions that may contribute to climate change.<sup>12</sup> Environmentalists hail judicial willingness to consider that defense as “groundbreaking” and “precedent-setting.”<sup>13</sup>

#### B. Resurgence of Natural Law

Some ranchers cite natural law in various forms to claim vested

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<sup>9</sup> See Joshua Zaffos, *The Bundy bust-up*, High Country News, Mar. 8, 2015 (describing 2014 standoff between armed ranchers and federal law enforcement officials).

<sup>10</sup> See Julie Turkewitz, No Guilty Verdicts in Bundy Ranch Standoff Trial, N.Y. TIMES, (Aug. 22, 2017), <https://www.nytimes.com/2017/08/22/us/bundy-trial-nevada-verdict.html>.

<sup>11</sup> See, e.g., Debora Donahue, *Western Grazing: The Capture of Grass, Ground and Government*, 35 ENVTL. L. 721, 804-05 (2005) (quoting 2000 *High Country News* article regarding retaking by ranchers of cattle seized by BLM officials for unpermitted grazing in National Monument); *Light v. U.S.*, 220 U.S. 523, 535 (1911) (describing rancher’s threat to resist government effort to prevent illegal grazing); *Chorunos v. United States*, 193 F.2d 321, 323 (10<sup>th</sup> Cir. 1951) (describing open defiance of Range Manager’s order to keep livestock off particular federal lands).

<sup>12</sup> See, e.g., See Blake Nicholson, *Activists on Trial Wants More Time for ‘Necessity’ Defense*, ASSOCIATED PRESS, (Nov. 3rd 2017), <https://www.usnews.com/news/best-states/north-dakota/articles/2017-11-03/activist-on-trial-wants-more-time-for-necessity-defense> (describing efforts by Standing Rock protester to invoke necessity defense to justify civil disobedience); *State of Minnesota v. Klapstein et al.*, Court File Nos. 15-Cr-16-413, 15-Cr-16-414, 15-Cr-16-425, 15-Cr-16-25, Order and Memorandum (Oct. 17, 2017) (preserving necessity defense in criminal trespass case involving public utility pipelines).

<sup>13</sup> See Jessica Corbett, *Victory for “Valve Turners” as Judge Allows “Necessity Defense” for Climate Trial*, COMMON DREAMS, OCT. 17, 2017, <https://saltlaw.us7.list-manage.com/track/click?u=bb6cea7ee89de64cd84564715&id=a12de5f99c&e=c5edf65a8e>.

property rights in public lands,<sup>14</sup> as do some lawyers who represent them<sup>15</sup> (collectively, “natural law ranch advocates”<sup>16</sup>). Those claims also resonate with the populist narrative of western rugged individualism depicted in popular literature and film.<sup>17</sup> That narrative might help explain the jury

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<sup>14</sup> See WAYNE HAGE, *STORM OVER RANGELANDS, PRIVATE RIGHTS IN FEDERAL LANDS* 81-86 (3<sup>rd</sup> ed. 1994) (linking alleged rights of western settlers to natural law theory); R. MCGREGOR CAWLEY, *FEDERAL LAND, WESTERN ANGER: THE SAGEBRUSH REBELLION & ENVIRONMENTAL POLITICS* 12-13, 118-19, 123-42 (1993) (dating calls for privatization of federal lands to at least 1973, grounded in libertarian economic theory and political philosophy); Nora Simon, *Oregon Standoff: A Timeline of How the Confrontation Unfolded*, OR. LIVE (Jan. 2016), [http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/oregon\\_standoff\\_a\\_timeline\\_of.html](http://www.oregonlive.com/pacific-northwest-news/index.ssf/2016/01/oregon_standoff_a_timeline_of.html); Kevin Sullivan, *In the Nevada Desert, Bundy Family Warns of Another Standoff*, THE WASH. POST (NOV. 2016), [https://www.washingtonpost.com/national/2016/11/01/c45bdf4e-a04c-11e6-a44d-cc2898cfab06\\_story.html?utm\\_term=.f7f3349495c0](https://www.washingtonpost.com/national/2016/11/01/c45bdf4e-a04c-11e6-a44d-cc2898cfab06_story.html?utm_term=.f7f3349495c0). Some ranchers signed, and others considered signing, letters to the federal government denying federal authority to regulate grazing on federal lands, and unilaterally revoking their own grazing permits. See Tay Wiles, *Malheur Occupation Impacts Linger Throughout the West*, HIGH COUNTRY NEWS, Oct. 4, 2016 (describing New Mexico rancher Adrian Sewell’s letter, which he subsequently appears to have withdrawn, and meetings at which Utah ranchers considered similar action). The form letters, addressed to the Solicitor General of the United States, read: “I am a rancher in \_\_\_\_\_, \_\_\_\_\_ County in the State of \_\_\_\_\_. I am here by [sic] giving notice of termination of all contracts between me and the Bureau of Land Management, and the National Forest Service. I shall no longer require their help in managing my ranch nor help in any range improvements. I shall take full responsibility of these myself.”

<sup>15</sup> See Marc Stimpert, *Counterpoint: Opportunities Lost and Opportunities Gained: Separating Truth from Myth in the Western Ranching Debate*, 36 ENVTL. L. 481, 484-88 (2006); Frank J. Fallen & Karen Budd-Fallen, 30 IDAHO L. REV. 505, 507-08 (1994).

<sup>16</sup> It is difficult to know how many ranchers assert property rights to federal lands through prior use, but I do not presume that these views are universal. Apparently, at least a significant number of western ranchers share these views, but prefer anonymity. Michele Straube, Former Director, Environmental Dispute Resolution Program, Wallace Stegner Center for Land, Resources, and the Environment, University of Utah, S.J. Quinney College of Law, Personal Communication, July 21, 2017. Ms. Straube facilitated grazing collaborations between ranchers, federal and state officials, and environmental groups for many years. Other ranching representatives advocate balance between public and private uses and values on public lands. See W. LAND OWNER’S ALL., *Toward a Productive & Healthy West*, <https://www.westernlandownersalliance.org/wp-content/uploads/2017/08/Toward-a-Healthy-and-Productive-West.pdf> (undated statement sponsored by the Western Landowners Alliance, the Family Farm Alliance, the Rural Voices for Conservation Alliance, and Partners for Conservation, and signed by a large number of western ranches).

<sup>17</sup> See Donahue, *supra* note 11, at 722, 740, 769-74, 790-803 (2005) (identifying and critiquing the “cowboy myth” as it relates to federal grazing policies); George Cameron

verdicts in the Malheur and Nevada standoff cases<sup>18</sup> in the face of significant evidence supporting violations of federal law.<sup>19</sup> Similarly, some environmentalists argue that civil disobedience is necessary due to a failure of positive law to prevent or mitigate climate change or other environmental harms, relying on arguments that sound in natural law.<sup>20</sup>

Renewed reliance on natural law is not limited to the legal and policy debate over public lands, climate change or other natural resources. Some recent scholarship calls for the resurgence of natural law,<sup>21</sup> and arguments grounded in natural law pervade divisive aspects of the nation's current political discourse. It has been invoked by opponents of same-sex marriage,<sup>22</sup>

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Coggins, Parthenia Blessing Evans and Margaret-Lindberg-Johnson, *The Law of Public Rangeland Management I: The Extent and Distribution of Federal Power*, 13 ENVTL. L. 535, 539, 559 (1982) [hereinafter Public Land Management I] (alluding to “parochial attitudes in the West” and “an antifederal attitude sometimes labeled ‘frontier individualism,’” and noting rancher “pride in a certain frontier individualism, usually manifested as opposition to all things federal except federal money”). *But see*, Stimpert, *supra* note 15, at 524-529 (defending the legitimacy of western ranching families, lifestyles and economies).

<sup>18</sup> See Sottile, *supra* note 4 (quoting defense attorney's assertion that the fact that defendants possessed firearms on federal property is “as much a statement of [defendants'] rural culture as a cowboy hat or a pair of jeans. I think the jury believed at the end of the day that that's why the guns were there.”)

<sup>19</sup> In the Malheur prosecution, federal prosecutors produced significant physical evidence that defendants illegally possessed and used firearms on federal property. See U.S. Attorney's Office, DEPARTMENT OF JUSTICE (MAR. 3, 2016) <https://www.justice.gov/usao-nv/pr/fourteen-additional-defendants-charged-felony-crimes-related-2014-standoff-nevada>. In a later prosecution, however, a federal jury convicted four of the other participants on felony conspiracy and other charges.

<sup>20</sup> See *infra* Part IV.B.

<sup>21</sup> See generally, R.H. Helmholz, *Judicial Review and the Law of Nature*, 39 OHIO N.U.L. REV. 417 (2013); Hadley Arkes, *A Natural Law Manifesto or an Appeal from the Old Jurisprudence to the New*, 87 NOTRE DAME L. REV. 1245 (2012); Daniel R. Heimbach, *Natural Law in the Public Square*, 2 LIBERTY U. L. REV. 685 (2008); Kirk A. Kennedy, *Reaffirming the Natural Law Jurisprudence of Justice Clarence Thomas*, 9 REGENT U. L. REV. 33 (1997).

<sup>22</sup> See Many A. Brachear, *Gay Marriage versus Natural Law, Catholic Leaders Take*



opponents of publicly required insurance for birth control,<sup>23</sup> proponents of the right to bear arms,<sup>24</sup> and advocates for religious liberty.<sup>25</sup> The belief that religiously-based natural law can override positive law is seeing a widespread resurgence in ways that may also reflect changes in the U.S. political climate, including the populist wave of supporters who elected President Donald Trump.<sup>26</sup> In its most extreme form, proponents of theologically grounded natural law suggest that their obligation to obey civil law is secondary to their religious beliefs.<sup>27</sup> This is reminiscent of the divide among

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*Different Tack as State Lawmakers Near Action*, CHI. TRIBUNE (Dec. 30, 2012), [http://articles.chicagotribune.com/2012-12-30/news/ct-met-gay-marriage-natural-law-20121230\\_1\\_natural-law-natural-law-marriage-fairness-act](http://articles.chicagotribune.com/2012-12-30/news/ct-met-gay-marriage-natural-law-20121230_1_natural-law-natural-law-marriage-fairness-act) (quoting Chicago Cardinal Francis George as objecting that “Marriage comes to us from nature”).

<sup>23</sup> See David Ingram, *White House Fights Catholic Church Subpoena on Birth Control*, REUTERS (Apr. 5, 2013) (noting that “the Catholic Church teaches that artificial birth control is sinful because it violates natural law”).

<sup>24</sup> See Judge Andrew P. Napolitano, *Guns and Freedom*, FOXNEWS.COM (Jan. 10, 2013), <http://www.foxnews.com/opinion/2013/01/10/guns-and-freedom.html> (rooting the right to bear arms in the Declaration of Independence and its invocation of “the ancient principles of the natural law that have animated the Judeo-Christian tradition in the West”).

<sup>25</sup> See Paula K. Gerrett, *Kim Davis isn’t Fighting for Religious Freedom*, HUFFINGTON POST (Sept. 4, 2015), [http://www.huffingtonpost.com/paula-k-garrett/kim-davis-isnt-fighting-for-religious-freedom\\_b\\_8080008.html](http://www.huffingtonpost.com/paula-k-garrett/kim-davis-isnt-fighting-for-religious-freedom_b_8080008.html) (arguing that the debate over Kentucky County Clerk Kim Davis’s refusal to conduct gay marriages “isn’t actually about gay marriage or religious freedom. The debate is over civil versus natural law, and it’s a debate that we’ve engaged in throughout history. It is about the meaning of law in this country. Indeed, it is about the very soul of democracy.”).

<sup>26</sup> See David Leonhardt, *Trump Flirts With Theocracy*, THE N.Y. TIMES (Jan. 30, 2017) [https://www.nytimes.com/2017/01/30/opinion/trump-flirts-with-theocracy.html?\\_r=0](https://www.nytimes.com/2017/01/30/opinion/trump-flirts-with-theocracy.html?_r=0); Sarah Pulliam Bailey, *Act of Faith, Photo Surfaces of Evangelical Pastors Laying Hands on Trump in the Oval Office*, Wash. Post, July 12, 2017, available at: [https://www.washingtonpost.com/news/acts-of-faith/wp/2017/07/12/photo-surfaces-of-evangelical-pastors-laying-hands-on-trump-in-the-oval-office/?utm\\_term=.b980df6019dc](https://www.washingtonpost.com/news/acts-of-faith/wp/2017/07/12/photo-surfaces-of-evangelical-pastors-laying-hands-on-trump-in-the-oval-office/?utm_term=.b980df6019dc).

<sup>27</sup> An organization called “DependenceonGod.com” published advertisements in major daily newspapers proclaiming a “Declaration of Dependence Upon God and His Holy Bible,” signed by Evangelical religious leaders, business owners, attorneys, and politicians. See Salt Lake Tribune, Advertisement, Nov. 6, 2016, at A-17. The “Declaration” begins with the same words as the Declaration of Independence and adds: “Since our Creator gave us these rights, we declare that no government has the right to take them away. Among these rights

Puritans in the Massachusetts Bay Colony, a debate one author asserts has not yet been resolved in the United States.<sup>28</sup>

### C. The Tension with Positive Law

As explained in detail in Part III, federal authority over public natural resources rests on the positive law in the Property Clause of the U.S. Constitution, statutes and regulations adopted pursuant to that authority, and judicial decisions interpreting those texts.<sup>29</sup> The Property Clause grants the federal government plenary authority over its public lands.<sup>30</sup> Federal courts have upheld a significant body of federal statutes<sup>31</sup> against challenges to their scope and effect.<sup>32</sup> Courts have rejected claims challenging the legitimacy of

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is the right to exercise our Christian beliefs as put forth in God’s Holy Bible.” After proclaiming that these include specific rights such as life beginning at conception, and marriage as a union between one man and one woman, the document asserts the signatories’ “constitutional rights as Americans to follow these time honored Christian beliefs—[and to] commit to conducting our churches, ministries, businesses, and personal lives in accordance with our Christian faith *and choose to obey God rather than man*” (emphasis added).

<sup>28</sup> See JOHN M. BARRY, ROGER WILLIAMS AND THE CREATION OF THE AMERICAN SOUL; CHURCH, STATE, AND THE BIRTH OF LIBERTY 151, 206-07 (2012) (describing the debate over “the role of government in religion and of the reverse, the role of religion in the government” as “a fissure in America, a fault line which would rive America all the way to the present”). See also, JANE MAYER, DARK MONEY: THE HIDDEN HISTORY OF THE BILLIONAIRES BEHIND THE RISE OF THE RADICAL RIGHT 230 (2016) (identifying Calvinist roots in extreme libertarian market theories among those who “crusaded against abortion, homosexuality, feminism, and modern science that conflicted with their teachings”).

<sup>29</sup> U.S. CONST. art. IV, §3, cl. 2; see Public Rangeland Management I, *supra* note 17, at 569-72, 593-94.

<sup>30</sup> See *Kleppe v. New Mexico*, 426 U.S. 529, 534 (1976); *Light v. U.S.*, 220 U.S. 523, 536-37 (1911); *Camfield v. United States*, 167 U.S. 518, 525-26 (1897).

<sup>31</sup> See, e.g., FEDERAL LAND POLICY AND MANAGEMENT ACT OF 1976, 43 U.S.C. §§1701 – 1787; NATIONAL PARKS SERVICE ORGANIC ACT, 54 U.S.C. 100101 et seq.; NATIONAL WILDLIFE REFUGE SYSTEM, 16 U.S.C. §668dd; NATIONAL FOREST MANAGEMENT ACT OF 1976, 16 U.S.C. §1600 et seq.

<sup>32</sup> See, e.g., *National Audubon Society, Inc. v. Davis*, 307 F.3d 835, 854 (9<sup>th</sup> Cir. 2002) (upholding federal authority over national wildlife refuges); *Wyoming v. United States* 279 F.3d 1214, 1228 (10<sup>th</sup> Cir. 2002) (same).

federal regulation of grazing on federal land,<sup>33</sup> or asserting private property rights to those lands.<sup>34</sup> Most recently, in a trespass action brought by the federal government against a vocal natural law ranch advocate, the Ninth Circuit held that existing water rights did not support an easement by necessity to graze livestock on public lands without a permit.<sup>35</sup>

Natural law ranch advocates, however, seek to refute this seemingly overwhelming body of positive law through arguments of three distinct kinds, reflecting different variations of natural law theory. At one level, the theistic rhetoric used by Ms. Cox and others suggests a version of natural law in which religious precepts alone are sufficient to override human positive law. That set of claims is most summarily refuted as inconsistent with basic

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<sup>33</sup> See *McKelvey v. United States*, 260 U.S. 353 (1922) (upholding conviction for obstructing passage of competing grazing users over public land); *Light v. U.S.*, 220 U.S. 523 (1911) (upholding injunction against grazing on federal forest reserve without required permit); *Camfield v. United States*, 167 U.S. 518 (1897) (upholding constitutionality of Unlawful Enclosures Act); *Diamond Rig Ranch, Inc. v. Morton*, 531 F.2d 1397 (10<sup>th</sup> Cir. 1976) (upholding federal authority to revoke grazing permits for regulatory violations); *Chournos v. United States*, 193 F.3d 321, 323 (10<sup>th</sup> Cir. 1952) (upholding requirement for grazing permits and holding that a “livestock owner does not have the right to take matters into his own hands and graze public lands without a permit”).

<sup>34</sup> *United States v. Fuller*, 409 U.S. 488 (1973) (rejecting argument that Fifth Amendment required compensation for value of grazing permits, because permits were revocable and conveyed no property rights); *United States v. Cox*, 190 F.2d 293 (10<sup>th</sup> Cir. 1951) (holding that jury could not, in determining just compensation for lands appropriated for military purposes, consider value due to grazing permits); *Osborne v. United States*, 145 F.2d 892 (9<sup>th</sup> Cir. 1944) (holding that condemnation of ranch for military purposes did not require compensation for value added by federal grazing permits, which were mere revocable licenses).

<sup>35</sup> *United States v. Estate of Hage*, 810 F.3d 712 (9<sup>th</sup> Cir. 2016). E. Wayne Hage, now deceased, authored the book cited in note 14 *supra*, asserting rights to graze on public lands based on natural law. His son, Wayne N. Hage, also refused to obtain grazing permits to use public lands, and was also a defendant in the case.

principles of separation of Church and State<sup>36</sup> and with contemporary American legal thought and method.

Viewed through a non-religious lens, however, natural law ranch advocates also assert two additional layers of natural law arguments. First, there is a strong component of strict constructionist constitutionalism in the views expressed by the Bundy family and their allies, with an implication that the Constitution guarantees ranchers certain inalienable rights to property and economic liberty. Second, natural law ranch advocates argue that the right to public grazing resources parallels the legal justification for the prior appropriation doctrine in western water law,<sup>37</sup> which arguably has groundings in natural law.<sup>38</sup> They assert that grazing resources are as essential as water to western economies and ways of life, and therefore similarly subject to natural rights of appropriation; and that ranchers and their forebears applied their labor to grazing resources just as they did for water, justifying associated property rights.<sup>39</sup>

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<sup>36</sup> U.S. CONST. amend. I.

<sup>37</sup> See generally, ROBERT W. ADLER, ROBIN K. CRAIG & NOAH D. HALL, MODERN WATER LAW, PRIVATE PROPERTY, PUBLIC RIGHTS, AND ENVIRONMENTAL PROTECTIONS I, 87-92 (2013).

<sup>38</sup> See *infra* Part III.

<sup>39</sup> See Falen & Budd-Falen, *supra* note 15, at 507-08, 522-24; Stimpert, *supra* note 15 at 483-88, 494, Todd Macfarlane, *A Realistic Assessment of Utah's Role in the Current "Public Lands" Debate*, RANGEFIRE.US (Jan. 7, 2017), <http://rangefire.us/2017/01/07/a-realistic-assessment-of-utahs-role-in-the-public-lands-debate/>. But see Donahue, *supra* note 11, at 723-31; Joseph M. Feller, *What is Wrong with the BLM's Management of Livestock Grazing on the Public Lands?*, 30 IDAHO L. REV. 555, 571-86 (1994); George Cameron Coggins & Margaret Lindberg-Johnson, *The Law of Public Rangeland Management II: The Commons and the Taylor Act*, 13 ENVTL. L. 1 *passim* (1982) [hereinafter *Public Land Management II*]. Professor Coggins and co-authors address the legitimacy of federal land ownership and

This article explores this apparent inconsistency in prior appropriation doctrine and the legitimacy of the arguments made by natural law ranch advocates. It begins in Part II with a brief review of natural law in U.S. legal history, to place the arguments made by natural law ranch advocates in context. This part also demonstrates that the first two lawyers of natural law argument described above were never recognized widely in U.S. Constitutional law, and have been rejected even if once part of the U.S. legal tradition. Part III evaluates the prior appropriation inconsistency in more detail, and suggests legitimate reasons why grazing on public lands have been and should be treated differently from water resources, as a matter of both positive law and consistent with natural law reasoning. Part IV concludes by explaining how resolution of the prior appropriation issue leads inexorably to a similar issue regarding the natural law basis for the public trust doctrine, which will be addressed in a companion article.

## **II. Natural Law in U.S. Legal History**

Natural law is the subject of an extensive literature<sup>40</sup> dating to Greek and Roman legal philosophers,<sup>41</sup> and it is neither prudent nor necessary to

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authority from a constitutional and statutory perspective, but they do not address the natural law theories directly. Public Land Management I, *supra* note 17, at 568-77, 593-98.

<sup>40</sup> For a collection of sources until the middle of the twentieth century, *see* Note, *Natural Law for Today's Lawyers*, 9 STAN. L. REV. 455 (1957).

<sup>41</sup> *See* Arkes, *supra* note 21, at 1248 (dating natural law philosophy at least to Aristotle); Heimbach, *supra* note 21, at 690-91 (discussing natural law philosophy of Plato, Aristotle, and Cicero); *Natural Law for Today's Lawyers*, *supra* note 40, at 459 n.7 (identifying roots of natural law in Greece and Rome).

attempt an exhaustive explanation here. Some background is essential, however, to understand the potential role of different natural law theories in ownership and control of public resources, and the propriety of relying on natural law to advocate for changes in positive law. Subpart A provides a primer on natural law and its history, with a focus on the three layers of claims suggested by natural law ranch advocates. Subpart B distills from this analysis some key principles relevant to the manner in which natural law and positive law might apply to those claims.

#### A. A Natural Law Primer

“Natural law” refers not to a single legal philosophy, but to a series of theories of law that have evolved significantly over time.<sup>42</sup> Although competing schools of natural law can reflect very different philosophies of what law is, and from where it derives, differences are also explained by the social and political circumstances in which the theories arose.<sup>43</sup>

To the extent that natural law is united by a common idea, it is that some form of “fundamental law” exists through which positive law adopted

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<sup>42</sup> See Robert P. George, *Natural Law, The Constitution, and the Theory and Practice of Judicial Review*, 69 *FORDHAM L. REV.* 2269, 2269 (2001); Heimbach, *supra* note 21, at 688; Albert W. Altschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 *PEPPERDINE L. REV.* 491, 493 (2009); *Natural Law for Today's Lawyer*, *supra* note 40, at 456-57 & n.2 (1957); David C. Bayne, S.J., *The Supreme Court and the Natural Law*, 1 *DEPAUL L. REV.* 216, 216 (1951-52).

<sup>43</sup> See John S. Harbison, *Hohfeld and Herefords: The Concept of Property and the Law of the Range*, 22 *N.M. LAW REV.* 459, 461, 498 (1992) (arguing that all rights are “historically contingent,” and that law “is the product of social forces and a carrier of cultural meaning”).

by political bodies can be derived and evaluated.<sup>44</sup> The asserted source of that fundamental law has varied considerably, however, from revealed religion to human reason to a shared sense of morality within a polity. Thus, although positive law and natural law could be seen as competing theories,<sup>45</sup> the two are not necessarily<sup>46</sup> mutually exclusive. Under this view, positive law is the means by which individual polities effectuate a society's interpretation of natural law,<sup>47</sup> implement natural law given varying circumstances,<sup>48</sup> or address matters not implicated by natural law.<sup>49</sup> Conversely, the legitimacy or moral justness of positive law can be assessed by reference to natural law. Legal positivism, by contrast suggests a sharp distinction between law and morality to ensure fidelity to law independent of a judge's (or anyone else's) views of morality.<sup>50</sup>

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<sup>44</sup> See, e.g., EVA H. HANKS, MICHAEL E. HERZ & STEVEN S. NEMERSON, *ELEMENTS OF LAW* 477-78 (1994); George, *supra* note 42, at 2269; *Natural Law for Today's Lawyer*, *supra* note 40, at 457; Helmholtz, *supra* note 21, at 418; Louis W. Hensler III, *A Modest Reading of St. Thomas Aquinas on the Connection Between Natural Law and Human Law*, 43 CREIGHTON L. REV. 153, 155 (2009).

<sup>45</sup> *Natural Law for Today's Lawyer*, *supra* note 40, at 474 (juxtaposing positive law and natural law as "opposing schools of legal analysis").

<sup>46</sup> To those who advocate absolute, and particularly theistic versions of natural law, one has an obligation to obey God's commands even in the face of contrary positive law. Under this view, natural law is not only necessary, but also sufficient, to create binding law even in the absence of positive law.

<sup>47</sup> For example, natural law might suggest that killing is not permissible, but societies might differ in what constitutes self-defense, or whether the death penalty is justified.

<sup>48</sup> For example, natural law might suggest that individuals must contribute to the general welfare, but one jurisdiction might choose property taxes and another one might select sales taxes.

<sup>49</sup> For example, natural law may have nothing to say about procedures for registering automobiles to ensure the orderly administration of traffic safety.

<sup>50</sup> For the classic modern defense of legal positivism, see H.L.A. Hart, *Positivism and the Separation of Law and Morals*, 71 HARV. L. REV. 593 (1958) (explaining the evolution of legal positivism from the theories of utilitarian theorists Bentham and Austin); H.L.A.

1. *Natural law in the medieval Catholic tradition*

Despite the historical importance of Greek, Roman and earlier Christian natural law philosophy, the medieval Catholic tradition is a logical starting point<sup>51</sup> because of its relevance to the theistic claims made by some natural law ranch advocates and some contemporary scholars.<sup>52</sup> St. Thomas Aquinas and other Catholic scholars in the Middle Ages posited that God handed down or “revealed” a set of fundamental moral precepts, such as the Ten Commandments, that humans are bound to obey.<sup>53</sup> Aquinas nonetheless believed that natural law was accessible to humans because God implanted a fundamental sense of morality into their hearts.<sup>54</sup> Individual governments might manifest those precepts differently through their positive law; but if one believes these precepts come from deity, it is logical to view them as

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HART, *THE CONCEPT OF LAW* (1960); see also, R. George Wright, *Is Natural Law Theory of Any Use in Constitutional Interpretation?*, 4 S. CAL. INTERDISC. L.J. 463, 469-70 (quoting John Hart Ely’s critique that “you can invoke natural law to support anything you want”); Albert W. Alschuler, *From Blackstone to Holmes: The Revolt Against Natural Law*, 36 Pepp. L. Rev. 491, 496-97 (2009) (critiquing Justice Holmes’s view that natural law held no legitimacy for law that must evolve constantly); Russell Kirk, *Natural Law and the Constitution of the United States*, 69 NOTRE DAME L. REV. 1035, 1046 (1994) (quoting Justice Frankfurter’s legal realism view that natural law is nothing more than “what sensible and right-minded men do every day”). At least in the context of constitutional interpretation, however, Ely rejected the terminological distinction between “natural law” and “positivism” in favor of a distinction between “interpretivism” and “noninterpretivism”. JOHN HART ELY, *DEMOCRACY AND DISTRUST, A THEORY OF JUDICIAL REVIEW* 1 (1980).

<sup>51</sup> My goal here is not to provide a complete history of natural law theory.

<sup>52</sup> Robert George, for example, retains the theistic view that positive law is “morally good or bad—just or unjust—depending on its conformity to the standards of the ‘natural,’ (viz. moral) law that is no mere human creation.” George, *supra* note 42, at 2269. See also, Helmholtz, *supra* note 21, at 417 (suggesting that natural law posits “a necessary connection between law and morality” implanted by God in the hearts of people).

<sup>53</sup> See *Natural Law for Today’s Lawyer*, *supra* note 40, at 475.

<sup>54</sup> See Helmholtz, *supra* note 21, at 417.



imperatives through which positive law must be judged.<sup>55</sup>

Thomastic natural law is very different, however, from a view of revealed natural law in which individuals—as opposed to governments through legitimate authority—may decide whether to obey positive law.<sup>56</sup> The latter extreme view was asserted by some of the Malheur defendants,<sup>57</sup> and also recently by a County Clerk in Kentucky who refused to exercise her positive law responsibility to marry LGBT couples because it violated her religious beliefs.<sup>58</sup> One basic principle of natural law, however, is that, because people are naturally inclined to live in ordered societies, and because it is difficult for humans to agree on all applications of natural law, they must respect the positive law of their societies until changed.<sup>59</sup>

This disclaimer in Thomastic (and later) theories of natural law is perplexing in the context of civil disobedience, and has troubled those who, at times in our history, believed aspects of positive law to be fundamentally

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<sup>55</sup> See Helmholtz, *supra* note 21, at 420-21. One of the debates that shook Puritan New England, however, was whether civil government should play any role in enforcing the “first table” of the Ten Commandments, those that define humans’ responsibility to God, as opposed to those Commandments that implicate human conduct within civil society (such as the prohibition against murder). See BARRY, *supra* note 28, at 206.

<sup>56</sup> See *supra* note 27 (describing the “Declaration of Dependence Upon God and His Holy Bible”).

<sup>57</sup> See *supra* notes 4-6 and accompanying text.

<sup>58</sup> See Gerrett, *supra* note 25.

<sup>59</sup> See *Natural Law for Today’s Lawyers*, *supra* note 40, at 480, 484; Kirk, *supra* note 50, at 1042-43 (arguing that it would be inconsistent with the “very existence of government” and lead to anarchy to allow each individual free to disobey positive law); Lon Fuller, *American Legal Philosophy at Mid-Century, A Review of Edwin W. Patterson’s Jurisprudence, Men and Ideas of the Law*, 6 J. LEGAL ED. 457, 468 (1954) (describing the natural law “duty of obeying the positive law as founded on natural law itself [and] subject to exception only in extreme cases”).

immoral. The clearest example is slavery, which was affirmatively sanctioned as a matter of positive law in the U.S. Constitution<sup>60</sup> before adoption of the Thirteenth Amendment.<sup>61</sup> Radical abolitionists and some judges found that positive law unconscionable, but others felt bound to obey regardless of their individual moral views.<sup>62</sup> This highlights the nature of civil disobedience, in which one disobeys what one regards as an unjust law while accepting the consequences of any resulting prosecution, as a means to communicate disagreement and to precipitate change. Slavery, however, may prove too much due to the clarity of the case *ex post*. Not every disagreement with positive law is presumptively legitimate, and particularly for issues in which there is widespread moral disagreement within society, sanctioning disobedience with positive law based on every individual's personal views is anarchistic.<sup>63</sup>

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<sup>60</sup> U.S. CONST. art. I, §2, cl. 3 (distinguishing between “free” and “other” persons, changed by the Fourteenth Amendment), art. IV, §2, cl. 3 (Fugitive Slave Clause, superseded by Thirteenth Amendment)

<sup>61</sup> U.S. CONST. amend. XIII.

<sup>62</sup> In *The Antelope*, Chief Justice John Marshall proclaimed that slavery “is contrary to the law of nature can scarcely be denied,” but held that one nation was not free to contravene the positive law of another to enforce that precept. *The Antelope*, 23 U.S. (10 Wheat.) 66, 120-22 (1825). *But see*, *United States v. La Jeune Eugenie*, 26 F.Cas. 832, 846 (C.C.D. Mass. 1822) (Story, J. sitting as Circuit Justice, upholding federal government's claim to seized French slave trading vessel because slavery “is founded in a violation of some of the first principles, which ought to govern nations. It is repugnant to the great principles of human duty, the dictates of natural religion, the obligations of good faith and morality, and the eternal maxims of social justice.”). For the classic explication, *see* ROBERT M. COVER, *JUSTICE ACCUSED, ANTISLAVERY AND THE JUDICIAL PROCESS* (1984).

<sup>63</sup> Robert Cover adopts a more nuanced view in the case of discrete communities (such as the Amish and the Mennonites), whose alternative interpretations of law he asserted are entitled to legitimacy in a pluralistic society, no less presumptively “valid” than those of judges. *See Cover, supra* note 3 (*passim*). One could argue that natural law ranch advocates

It makes sense that medieval Catholic theologians and legal scholars during that profoundly religious period would propose a theory of natural law rooted in absolute laws commanded by God. The Catholic Church was a significant political as well as religious force, and competed with the co-existent feudal order to govern society.<sup>64</sup> A religious philosophy that promoted absolute obedience, in a society with weak state control, helped to solidify the power of the Catholic Church. Where a dominant institution held a monopoly in proclaiming God's higher law, there was less risk that multiplicity of interpretation would contribute to anarchy. Through excommunication,<sup>65</sup> the Inquisition,<sup>66</sup> and other authority, the Church had direct mechanisms to enforce its view of natural law.

## 2. *Natural Law in the Enlightenment*

Enlightenment natural law theory is particularly relevant here because of its influence on the early American legal philosophy<sup>67</sup> on which natural

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constitute such a community, whose internal normative worldview legitimizes their alternative legal interpretations. I do not read Cover, however, to negate the legal force of positive law and definitive interpretation and application by the courts in the face of such alternative legal views.

<sup>64</sup> See Philip S. Gorski, *Historicizing the Secularization Debate: Church, State, and Society in Late Medieval and Early Modern Europe, Ca. 1300 to 1700*, 65 AM. SOC. REV. 138, 140 (2000) (noting the dominance of the Church in Medieval society).

<sup>65</sup> See, e.g., G.W. BERNARD, *THE KING'S REFORMATION, HENRY VIII AND THE REMAKING OF THE ENGLISH CHURCH* 34 (2007) (describing potential for excommunication of King Henry VIII over divorce from Anne Boleyn).

<sup>66</sup> See generally, ELPHEGES VACANDARD, *THE INQUISITION, A CRITICAL AND HISTORICAL STUDY OF THE COERCIVE POWER OF THE CHURCH* (1915) (examining the Catholic Inquisition from the standpoint of morality, justice, and religion).

<sup>67</sup> It is doubtful that there was a dominant, legal philosophy in Colonial America, as opposed to a wide range of influences from which the Colonists drew and derived equally varying views. See ELY, *supra* note 50, at 48-49.

law ranch advocates rely. During the Enlightenment in Europe and Colonial America, religiously derived natural law evolved into a theory positing that moral principles to guide human laws can be derived from “right reason” (rational thought) based on fundamental principles of human nature.<sup>68</sup> Enlightenment philosophers still viewed natural law as universal, because it was based on immutable characteristics of people and communities that predated organized society, and therefore requires no state involvement for its development or enforcement, leading to “pre-political” rights and duties.<sup>69</sup> Most Enlightenment legal and political philosophers, however, retained a religious foundation for natural law.<sup>70</sup> That tradition inspired the political leaders of the American Revolution<sup>71</sup> to separate from England based on

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<sup>68</sup> See Arkes, *supra* note 21, at 1248 (rooting Enlightenment natural law in Kant’s theory that all moral principles came from rational being); Helmholz, *supra* note 21, at 419-20 (tracing natural law roots in Europe from the twelfth through the nineteenth centuries); Heimbach, *supra* note 21, at 694 (explaining Grotius’s view that natural law is the product of “autonomous, non-regenerated human reason”), 694-95 (explaining role of Enlightenment philosophers such as Hobbs and Rousseau, although claiming that the non-religious nature of their work was responsible for the abuses of the French revolution); Diarmuid F. O’Scannlain, *The Natural Law in the American Tradition*, 79 *FORDHAM L. REV.* 1513 (2011) (identifying natural law as accessible to all humans through reason); Kennedy, *supra* note 21, at 44-47 (explaining Enlightenment natural law emphasis on “empiricism and rationalism”).

<sup>69</sup> Richard A. Epstein, *How Spontaneous? How Regulated? The Evolution of Property Rights Systems*, 100 *IOWA L. REV.* 2341, 2342 (2015); see also, ROBERT NOZICK, *ANARCHY, STATE AND UTOPIA* 10-25 (1974, revised ed. 2013); *Natural Law for Today’s Lawyers*, *supra* note 40, at 461. .

<sup>70</sup> Those writers included Protestants such as Grotius, Vattel and Pufendorf. See R. H. Helmholz, *The Law of Nature and the Early History of Unenumerated Rights*, 9 *U. Pa. J. Const. L.* 401, 407 (2007); Kirk, *supra* note 50, at 1037 (discussing manner in which natural law was “Protestantized” by Grotius and others); Heimbach, *supra* note 21, at 694 (contrasting Grotius’s view that morality could be derived from human reason but full acceptance depended on belief in God, with Calvinist view that the only path to moral righteousness was through God).

<sup>71</sup> See Helmholz, *supra* note 21, at 421 n.30 (quoting Blackstone); O’Scannlain, *supra*

“inalienable rights” endowed by their Creator.<sup>72</sup>

Enlightenment philosophy continued to suggest that any positive law inconsistent with natural law was illegitimate or void. Notwithstanding the more egalitarian idea that natural law was accessible to anyone through human reason, however, this theory gave individuals no greater license to decide what constituted binding law.<sup>73</sup> Governments still dictated enforceable rules through positive law, with judicial, legislative, and other mechanisms to conform positive law to natural law when necessary.<sup>74</sup> Enlightenment

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note 68, at 1517 (noting Locke’s heavy influence on Jefferson); Heimbach, *supra* note 21, at 695 (discussing influence of Hobbes and Rousseau); Morton J. Horwitz, *The History of the Public/Private Distinction*, 130 U. PA. L. REV. 1423, 1424 (1982) (linking the origins of a private realm to the “natural rights liberalism of Locke”); Wright, *supra* note 50, at 473 (Locke); Kennedy, *supra* note 21, at 44-47 (discussing influence of Locke and Montesquieu on Jefferson); Epstein, *supra* note 69, at 2346 (discussing Locke’s theories of property).

<sup>72</sup> See *infra* Part II.B (discussing Declaration of Independence); HANKS ET AL., *supra* note 44, at 479 (noting natural rights rhetoric dating to the Declaration of Independence); *Natural Law for Today’s Lawyers*, *supra* note 40, at 487 (discussing the “founding father approach” to natural law espoused by many Americans); Arkes, *supra* note 21, at 1246-48 (quoting James Wilson on the object of the Constitution to secure existing rights “we already possess by nature”), 1255 (quoting Alexander Hamilton in *The Federalist* No. 31 and noting as the “anchoring proposition of the American Republic, ‘all men are created equal’”); *but see*, O’Scannlain, *supra* note 68, at 1514 (citing John Hart Ely’s view that the idea of natural law in the Constitution was controversial, not widely accepted, and “not even the majority view among” the framers); George, *supra* note 42, at 2269 (discussing Jefferson’s appeal to natural rights in Declaration of Independence), 2276 (describing founders’ belief in natural law as embodied in English common law); Kirk, *supra* note 50, at 1039 (describing American political leaders at the time of the Constitutional Convention as Blackstone disciples); Alschuler, *supra* note 50, at 491 (identifying Blackstone as “the principal teacher of law to American lawyers of the revolutionary generation and the early republic).

<sup>73</sup> See William Blackstone, COMMENTARIES 1:120-41 (1765), *reprinted in* THE FOUNDERS’ CONSTITUTION, Vol. V, 388, 388 (Phillip B. Kurland & Ralph Lerner eds., 1987) (“[E]very man, when he enters into society, gives up a part of his natural liberty, as the price of so valuable a purchase; and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws, which the community has thought proper to establish. And this species of legal obedience and conformity is infinitely more desirable, than that wild and savage liberty which is sacrificed to obtain it.”)

<sup>74</sup> See Helmholz, *supra* note 70, at 401-02.

philosophers reinforced the principle that natural law requires obedience to duly adopted positive law<sup>75</sup> to guarantee that society functions to ensure harmonious relations. Even in an extreme case—such as the American Revolution—when a society determined that existing positive law so violated “inalienable rights”<sup>76</sup> that a radical change of government was justified,<sup>77</sup> natural law demanded that they do so through legal means.<sup>78</sup>

Just as Catholic natural law reflected prevailing social, political and other circumstances, Enlightenment natural law reflected the surrounding political and social milieu. Nation-states competed against monarchs who asserted the divine right to rule by fiat rather than reason.<sup>79</sup> The argument that individuals could deduce principles of law and morality through reason<sup>80</sup>

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<sup>75</sup> See JOHN LOCKE, *THE TWO TREATISES ON CIVIL GOVERNMENT*, BK. II, CH. 11, § 134-36 (Dec. 1689) (arguing that legitimate laws passed by the consent of the people command obedience); Steven Kautz, *Liberty, Justice, and the Rule of Law*, 11 *Yale J.L. & Human.* 435, 442-43 (1999) (arguing that the Enlightenment philosophers recognized that obedience to legitimate positive law is necessary to obtain liberty).

<sup>76</sup> See *infra* Part II.B (quoting Declaration of Independence).

<sup>77</sup> See Fuller, *supra* note 59, at 468 (suggesting that the duty to obey positive law might be subject to exception in “extreme cases”).

<sup>78</sup> In the American Revolution, the Continental Congress was an official governmental body even if it did not have the sanction of the English government. MERRILL JENSEN, *THE ARTICLES OF CONFEDERATION, AN INTERPRETATION OF THE SOCIAL-CONSTITUTIONAL HISTORY OF THE AMERICAN REVOLUTION* 56 (1940) (describing the First Continental Congress as being comprised of “the ambassadors of twelve distinct nations”). Contrast the process that implemented the American Revolution from the mob rule that characterized the French Revolution. See DAN EDELSTEIN, *THE TERROR OF NATURAL RIGHT, REPUBLICANISM, THE CULT OF NATURE, & THE FRENCH REVOLUTION* 15-21 (describing use of natural law and natural rights to justify the reign of terror during the French Revolution), 131-33 (comparing French and American revolutions in treatment of dissidents) (2009).

<sup>79</sup> See Horwitz, *supra* note 71, at 1423 (discussing tension between emergence of nation-states and notions of sovereignty in sixteenth and seventeenth centuries and the philosophy of natural rights to set limits on state power).

<sup>80</sup> See William Blackstone, *COMMENTARIES* 1:120-41 (1765), reprinted in *THE FOUNDERS’ CONSTITUTION*, Vol. V, 388, 388 (Phillip B. Kurland & Ralph Lerner eds., 1987)

supported the rights of people to self-government.

### 3. *Natural law in the secular state*

Beginning in the nineteenth century, much of Europe gradually abandoned natural law in favor of secular systems of positive law reflected in civil codes and other sources.<sup>81</sup> Even in England, whose common law heritage gave rise to the natural law philosophies of Locke, Blackstone and Coke,<sup>82</sup> utilitarian legal philosophers such as Austin and Bentham led a positive law transition best reflected in modern times by the writings of H.L.A. Hart.<sup>83</sup>

Natural law in the American Colonies, by contrast, initially retained a religious tenor given the dominance of Protestant society.<sup>84</sup> That philosophy

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(asserting that absolute rights are “few and simple” but that people could derive secondary rights that are “far more numerous and more complicated” from those fundamental rights).

<sup>81</sup> See *Natural Law for Today's Lawyer*, *supra* note 40, at 461.

<sup>82</sup> See *supra* notes 71-73 and accompanying text.

<sup>83</sup> See Hart, *Positivism and the Separation of Law and Morals*, *supra* note 50; HART, THE CONCEPT OF LAW, *supra* note 50 (arguing that law was simply those rules dictated by human politics with no necessary connection to morality). Led by the scholarly writings of Justice Oliver Wendell Holmes, both theistic and Enlightenment versions of natural law similarly lost their hold in the United States by the first half of the Twentieth Century. See Horwitz, *supra* note 71, at 1426; *infra* Part II.C.

<sup>84</sup> See, e.g., Samuel Adams, THE RIGHTS OF THE COLONISTS, Nov. 20, 1772, *Writings* 2:350-59, reprinted in THE FOUNDERS' CONSTITUTION, Vol. V, 394-96 (Phillip B. Kurland & Ralph Lerner, eds. 1987) (discussing religious toleration for Protestants but not Catholics, and describing the rights of the Colonists as Christians); Kirk, *supra* note 50, at 1038 -39 (noting that most of the thirteen Colonies adopted the Church of England as their official religion, that the natural law teachings of Anglican preachers was “imparted from American pulpits,” and that most of the Framers of the Constitution were Anglicans); Bayne, *supra* note 42, at 217 (quoting James Otis in 1764 that natural rights were based on the “unchangeable laws of God” to suggest that natural law was fundamental to “the entire governmental philosophy of the United States from its conception”).

became less tenable as the Colonies adopted principles of religious tolerance,<sup>85</sup> expressed ultimately in the Establishment Clause of the First Amendment.<sup>86</sup> Along with the Free Exercise Clause of the First Amendment,<sup>87</sup> the Establishment Clause ensures religious liberty by preventing the political or legal dominance in the United States of any faith (or religion at all), but simultaneously limits the degree to which religious text or philosophy—or any interpretation of religious texts—dictate Constitutional interpretation or any other aspect of federal or state law.

Thus, although religion influenced early American jurists,<sup>88</sup> the rhetoric and justification for natural law adopted a secular grounding. Even if they believed in *natural rights* endowed by a Creator, American proponents of *natural law*<sup>89</sup> argued that it was based on universally accepted moral principles or legal maxims.<sup>90</sup> As students of Blackstone,<sup>91</sup> early American jurists believed that natural law principles could be derived from a few,

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<sup>85</sup> See generally, BARRY, *supra* note 28.

<sup>86</sup> U.S. CONST., amend. I (“Congress shall make no law respecting an establishment of religion...”).

<sup>87</sup> *Id.* (“Congress shall make no law ... abridging the free exercise of” religion).

<sup>88</sup> See Helmholz, *supra* note 70, at 401 (asserting that contemporary American lawyers believed that principles of justice “were part of human nature, formed within us by God. These principles were common to all men everywhere, they were immutable, and they provided the necessary foundation of all human law.”).

<sup>89</sup> See Kirk, *supra* note 50, at 1040 (distinguishing between Enlightenment doctrines of natural rights and traditional doctrines of natural law).

<sup>90</sup> See Arkes, *supra* note 21, at 1254-56. Hamilton used this logic (“the nature and reason of the thing”) in *The Federalist Papers*. See THE FEDERALIST No. 78, at 102, No. 81, at 122, No. 82 at 132, No. 83 at 136, No. 84 at 155, 160 (Alexander Hamilton).

<sup>91</sup> See *supra* note 71.



fundamental, and commonly accepted natural rights of pre-political people.<sup>92</sup> To be sure, religious natural law theories have continued in the United States through the influence of Catholic<sup>93</sup> and Evangelical<sup>94</sup> legal scholars, but those ideas have disappeared from formal legal decisions in the United States.<sup>95</sup> Indeed, the most ardent legal positivists among the U.S. judiciary in recent years include conservatives such as Justice Scalia and Judge Bork,<sup>96</sup> whose ideological views most likely align with advocates for natural law grounded in religion.

The elimination of religion in natural law also prompted a shift in which branches of government should determine how natural law influences positive law. Judges in the religious natural law tradition were free to declare void any law enacted through legislative, executive, or even monarchial

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<sup>92</sup> See *supra* note 69.

<sup>93</sup> See, e.g., Bayne, *supra* note 42; *Natural Law for Today's Lawyer*, *supra* note 40, at 473 (noting that natural law was “relegated” to Catholic law schools); John Hart Ely, *Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different from Legislatures*, 77 VA. L. REV. 833, 848 (1991) (tracing Senator Joe Biden’s belief in natural law to his Catholic upbringing); O’Scannlain, *supra* note 68, at 1514 (citing view of natural law as parochial, and specifically Catholic); Hensler, *supra* note 44.

<sup>94</sup> See, e.g., Heimbach, *supra* note 9, at 686 (discussing resurgence of interest in natural law among evangelicals).

<sup>95</sup> See *infra* Part II.C; *Natural Law for Today's Lawyer*, *supra* note 50, at 473 (noting that natural law was “banished” from judicial opinions and legal education in the late nineteenth century); Heimbach, *supra* note 21, at 696 (decrying the rejection of religiously-based natural law in the twentieth century); Kirk, *supra* note 50, at 1036 (citing the prevalence of judicial positivism since 1938); Helmholz, *supra* note 70, at 402 (noting that natural law “lost its hold on the common assumptions of most lawyers” by the end of the nineteenth century).

<sup>96</sup> See Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CINN. L. REV. 849 (1989); ROBERT H. BORK, *THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW* 208-11 (1990).

authority. Once natural law is stripped of its theistic force, societies may adopt different governmental systems to decide which moral concepts should govern positive law. As explained below,<sup>97</sup> that is what the Framers of the U.S. Constitution did in adopting a democratic republic. Elected branches of government make policy determinations about positive law, for which they are accountable through the electoral process. Judges are not free to invalidate that law based solely on their own notions of natural law or other sources of morality or policy, unless a statute violates constitutional requirements. The federal and state constitutions became the “higher law” for purposes of judicial review.<sup>98</sup>

This shift, however, did not eliminate the idea that some kind of “fundamental law” necessarily plays a role in the legal process.<sup>99</sup> Secular versions of natural law maintain that law cannot be separated from morality, but that morality need not be tied to religion.<sup>100</sup> Lon Fuller, for example, forged a procedural theory of law as morality (which he referred to as the

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<sup>97</sup> See *infra* Part II.B.

<sup>98</sup> See generally, O’Scannlain, *supra* note 68; George, *supra* note 42; *The Federalist* No. 78 (Hamilton) (identifying a constitution as “a fundamental law,” to which judges must be bound over all other sources of law).

<sup>99</sup> The classic modern defense of natural law in the face of H.L.A. Hart’s ardent positivism, see *supra* note 50 and accompanying text, was Lon Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958), and later LON FULLER, *THE MORALITY OF LAW* (revised ed. 1969). Earlier, Fuller had distinguished between law based on state force and on moral imperatives. Fuller, *supra* note 59, at 457 (1954); Lon L. Fuller, *THE LAW IN QUEST OF ITSELF* 2-15 (1940); see also, Kirk, *supra* note 50 at 1045-47 (arguing that the private interpretation of natural law should not be used to settle conflicts, but that natural law should help form the judgments of lawmakers).

<sup>100</sup> See, e.g., Kennedy, *supra* note 21, at 39-40 (explaining that Fuller “still rejected he providential origins of natural law”).

“internal morality” of law) in which the legitimacy of positive law depends on a series of moral precepts that ensure the legitimacy of positive law without dictating its substantive content.<sup>101</sup> Ronald Dworkin advocates that law derives its legitimacy from “integrity”.<sup>102</sup> John Hart Ely, who would eliminate the positive law-natural law dichotomy from a terminological perspective, rejects the unconstrained use of extrinsic sources (or a judge’s own view of morality) to reach constitutional decisions, but believes it is appropriate to interpret ambiguities and fill interstitial gaps in constitutional text to ensure the integrity and inclusiveness of the political process and to ensure equality, so that the democratic process through which substantive judgments are made by elected officials is legitimate.<sup>103</sup> Robert Cover goes further, arguing that there is room for diverse sets of normative structures (“nomos”) to be embraced by discrete communities, leading to alternative—but equally valid—sets of legal interpretations.<sup>104</sup> Some writers advocate a more limited role for natural law, as an interpretive tool rather than a binding rule of decision,<sup>105</sup> or to be used only in extreme circumstances such as slavery, genocide, or other patent human rights violations.<sup>106</sup> This begs the

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<sup>101</sup> See FULLER, *THE MORALITY OF LAW*, *supra* note 99, at 33-94 (identifying those precepts (in brief) as rules that are transparent, prospective, understandable, consistent, attainable, consistent, and enforced fairly and evenhandedly).

<sup>102</sup> See RONALD DWORKIN, *LAW’S EMPIRE* (1986).

<sup>103</sup> See ELY, *DEMOCRACY AND DISTRUST*, *supra* note 50, at 87-88.

<sup>104</sup> Cover, *Nomos and Narrative*, *supra* note 3.

<sup>105</sup> See O’Scannlain, *supra* note 68, at 1515, 1524-25 (arguing that natural law is useful to help judges go beyond the constitutional text to understand its original meaning).

<sup>106</sup> See Hensler, *supra* note 44, at 166 (advocating a limited role for natural law only

question, of course, of what constitutes a sufficiently “extreme” case to invoke natural law.

Others advocate a return to a jurisprudence in which jurists can rely on natural law sources, some religious in origin,<sup>107</sup> to safeguard fundamental rights that predated the Constitution.<sup>108</sup>

Secular variations of natural law posited by U.S. legal scholars have significant differences in focus, but reflect a common theme. They seek to preserve the integrity of processes of law and democracy through which

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when “absolutely essential to the human law’s more limited goal”); Wright, *supra* note 50, at 486 (arguing that there must be cases, such as the legitimacy of slavery, where determinacy is clear and preferable). Some assert that absolute faith in the dominance of positive law was shaken by the horrors of fascism in World War II. *Natural Law for Today’s Lawyer*, *supra* note 40, at 463 (also noting that Hitler meticulously observed the formalities of legal process, came to power by constitutional means, and was elected by a plurality of the German people); *see also*, Fuller, *supra* note 59, at 465 (noting that the Nazis “came to power through the calculated exploitation of legal forms”). That experience likely explains the adoption in 1948 of the Universal Declaration of Human Rights, Universal Declaration of Human Rights, G.A. Res. es. 217A (III), U.N. Doc. A/810, at 71 (1948)(affirming the “equal and inalienable rights of all members of the human family”), which could be viewed as an international statement of positive law articulating those principles of human rights—or universally accepted moral principles—to which all people are entitled regardless of the particular political environment in which they reside.

<sup>107</sup> *See, e.g.*, Hensler, *supra* note 44, at 153 (referring to a revival of natural law tradition for “at least the last two decades”); Kennedy, *supra* note 21, at 36, 39 (referring to a natural law revival). The source and legitimacy of natural law was also a significant issue during the confirmation hearing in the U.S. Senate for Supreme Court Justice Clarence Thomas, and the unsuccessful effort to confirm Judge Robert Bork. *See* Linda P. Campbell, *Thomas Belief in “Higher Law” at Center Stage*, CHI. TRIB. (Aug. 18, 1991), [http://articles.chicagotribune.com/1991-08-18/news/9103010246\\_1\\_natural-law-natural-law-positive-law](http://articles.chicagotribune.com/1991-08-18/news/9103010246_1_natural-law-natural-law-positive-law); Laurence H. Tribe, *Clarence Thomas and ‘Natural Law’*, THE N.Y. TIMES (July 15, 1991), <http://www.nytimes.com/1991/07/15/opinion/clarence-thomas-and-natural-law.html>.

<sup>108</sup> Arkes, *supra* note 21, at 1254 (arguing that those sources “were usually not mentioned in the text of the Constitution, because they were truths that had to be in place before one could even have a constitution or a regime of law”); *see also*, Heimbach, *supra* note 21; Kennedy, *supra* note 21 (approving of Justice Thomas’s implicit reliance on natural law).

elected branches of government make substantive policy decisions. They also help to ensure equality and therefore equal participation in those processes, without dictating the substance of those decisions by reference to moral guideposts extrinsic to the Constitution or other positive law.

Moreover, even under a secular understanding of natural law, judges rely on judgment to interpret and enforce statutory law where it is ambiguous or has gaps, or to decide cases under common law where no statutory law applies. In that sense, some scholars identify common law as a form of natural law.<sup>109</sup> Absent legislative or constitutional mandates, judges apply reason to determine what rules best reflect and promote shared community norms.<sup>110</sup> Similarly, the concept of equity, through which judges may relieve parties from strict requirements of law, necessarily relies on recognized norms of what is “fair” or “just”.<sup>111</sup>

The ability of judges to use natural law to influence decisions not directly controlled by positive law, however, again does not allow an

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<sup>109</sup> See George, *supra* note 42, at 2276 (placing English common law as a “positive embodiment of the natural law”); Ronald Dworkin, *The Model of Rules*, 35 U. CHI. L. REV. 14, 17-22 (1967) (explaining common law as a community of judges in shaping rules from natural principles of justice); see also THOMAS LUND, *THE CREATION OF THE COMMON LAW, THE MEDIEVAL YEAR BOOKS DECIPHERED* 17 (2015) (describing common law as a legal process based on “reason and custom” in which judges are free to “alter general rules to achieve justice in a particular case”).

<sup>110</sup> See Dworkin, *supra* note 109, at 23-28 (citing as example that one should not be allowed to profit from one’s own dishonesty; see also, Horwitz, *supra* note 71, at 1425 (citing principle that equity will not enforce unfair contracts).

<sup>111</sup> See THE FEDERALIST No. 80 (Alexander Hamilton) (explaining role of equity to prevent absolute legal rules from generating “some undue and unconscionable advantage”).

individual to disobey positive law based on religious or other personal beliefs. Although the Supreme Court has struck positive law as a violation of an individual's right to free exercise of religion,<sup>112</sup> that requires a judicial ruling, not simply because positive law contravenes an individual's personal interpretation of natural law on other issues of public policy, such as the relationship between private property and public natural resources. Moreover, it has only occurred when positive law interfered directly with an individual's or a group's exercise of their first amendment rights.<sup>113</sup>

#### B. Natural Law in Formative U.S. Legal Documents

Advocates for a resurgence of substantive natural law rely in part on the text of foundational U.S. legal documents and the Revolutionary concept of divinely conveyed and therefore inalienable rights.<sup>114</sup> The diminishing role

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<sup>112</sup> See, e.g., *Lovell v. City of Griffin*, 303 U.S. 444, 448 (1938) (invalidating city ordinance requiring individuals to obtain permit before distributing religious literature).

<sup>113</sup> *Watchtower Bible and Tract Soc'y of New York Inc. v. Village of Stratton*, 536 U.S. 150 (2002) (striking statute that required permit to engage in religious proselytizing, anonymous political speech, and the distribution of handbill); *Thomas v. Collins*, 323 U.S. 516 (1945) (invalidating statute requiring a permit before speaking to union organization).

<sup>114</sup> See e.g., Arkes, *supra* note 21, at 1246-47 (arguing that the Constitution's purpose "was the securing of . . . natural rights," citing *The Federalist* No. 84), 1254 (arguing that to the extent natural law principles were not mentioned explicitly in the Constitution, it was "because they were the truths that had to be in place before one could even have a constitution or a regime of law"); O'Scannlain, *supra* note 68, at 1515-18 (arguing that natural law and natural rights were "woven into the fabric of the Constitution"); Kennedy, *supra* note 21, at 34 (defending jurisprudence of Justice Clarence Thomas based on his "connectedness to both the mind and spirit of the Framers of the Constitution"); George, *supra* note 42, at 2282 (expressing the softer view that the Constitution "embodies our founders' belief in natural law and natural rights," as opposed to specific textual support); see also, Helmholz, *supra* note 70, at 404-407 (comprehensively chronicling natural law principles in the writings of the Constitutional framers). The most extreme version of this belief, and one that one ordinarily would not think necessary to mention or refute in a scholarly law review article, is the belief that Jesus Christ was the author of the U.S. Constitution. See Shadee Ashtari, *Tom DeLay Claims God 'Wrote the Constitution'*, THE HUFFINGTON POST (Feb. 2014),

of theistic natural law in U.S. jurisprudence, however, began not with the positivist school of law advocated by jurists and legal scholars in the early twentieth century, as is sometimes claimed,<sup>115</sup> but in the foundational legal texts of the American Republic.<sup>116</sup>

The Declaration of Independence contains the most famous Revolutionary-era reference to natural law. While attributing a divine source to natural rights, however, the Declaration also highlights the critical role of positive law:

WHEN in the course of human Events, it becomes necessary for one people to dissolve the Political Bands which have connected them with another, and to assume *among the Powers of the Earth*, the separate and equal Station to which *the Laws of Nature and of Nature's God* entitle them, a *decent Respect to the Opinions of Mankind* requires that they should declare the causes which impel them to the Separation.

We hold these Truths to be self-evident, that all Men are created equal, that they are *endowed by their Creator with certain unalienable Rights*, that among these are Life, Liberty, and the Pursuit of Happiness—That *to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed....*<sup>117</sup>

The italicized portions signal ambivalence about the role of natural

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[http://www.huffingtonpost.com/2014/02/20/tom-delay-god-constitution\\_n\\_4826503.html](http://www.huffingtonpost.com/2014/02/20/tom-delay-god-constitution_n_4826503.html).

<sup>115</sup> See Altschuler, *supra* note 42 at 492, (identifying Justice Holmes as the source of the “revolt against natural law” in the late 19<sup>th</sup> and early 20<sup>th</sup> centuries).

<sup>116</sup> See, e.g., Kirk, *supra* note 50, at 1039 (arguing that even though American political leaders and jurists were Blackstone disciples, the Constitution was a “practical instrument of government” rather than a “natural law document”); O’Scannlain, *supra* note 68, at 1514 (discussing Ely’s view that the idea of natural law in the Constitution “was not even the majority view among those ‘framers’ we would be likely to think of first.”).

<sup>117</sup> THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

law in the call for independence. By referencing “Laws of Nature and of Nature’s God” and “endowed by their Creator with certain unalienable Rights,” the Declaration identifies deity as the source of the rights asserted by the Colonists. Some jurists and scholars cite these words as “Exhibit A” in their case for renewal of substantive natural law.<sup>118</sup> The phrases “Powers of the Earth” and “decent Respect to the Opinions of Mankind,” however, reflect Enlightenment natural law doctrine that people, through established governments, dictate how they should be governed, and by whom. The second paragraph clarifies that people establish institutions to “secure these Rights” through powers derived “from the Consent of the Governed.”

This suggests that the authors of the Declaration intended to break from existing understanding of natural law and establish a government, as later described by Lincoln, “of the people, by the people, for the people.”<sup>119</sup> To justify independence, however, being bound by English positive law, they needed to rely on authority other than English law. The Declaration’s reliance on French Enlightenment political philosophy served a political purpose to solicit French financial and military assistance.<sup>120</sup>

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<sup>118</sup> See, e.g., O’Scannlain, *supra* note 68, at 1516-17; Kennedy, *supra* note 21, at 50 (citing Clarence Thomas’s view that “the Constitution should be interpreted in a manner consistent with the higher law principles made manifest in the Declaration of Independence”).

<sup>119</sup> Abraham Lincoln, President of the United States, GETTYSBURG ADDRESS (Nov. 19, 1863).

<sup>120</sup> See Kirk, *supra* note 50, at 1040 (asserting that Jefferson and others, as Francophiles, adopted the rhetoric of Montesquieu and other French political philosophers to curry favor with the French political establishment).



Notably, once the Colonies declared independence, neither of the formative U.S. legal documents that followed embraced natural law significantly.<sup>121</sup> The Articles of Confederation cites neither natural law nor the “laws of God” as the source of substantive rights or principles of government.<sup>122</sup> The Constitution, in turn, begins with a Preamble that reads even more clearly as positive law:

*We the People* of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, *do ordain and establish* this Constitution for the United States of America.<sup>123</sup>

The fact that the Preamble declares that the “People of the United States” sought to adopt a Constitution to “secure the *Blessings* of Liberty” (emphasis added), does suggest that the framers drafted the Constitution as positive law to protect natural rights of people. This is consistent with the focus of the Founders on natural rights, and “blessings” could reflect belief in a religious

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<sup>121</sup> Some proponents of religiously grounded natural law minimize the significance of that change by asserting that the Declaration remains a “preamble to the preamble” to the Constitution. *See supra* note 118. *But see* Kirk, *supra* note 50, at 1040 (rejecting the view that the Declaration is a “preamble to the Constitution’s preamble” because “the Declaration is not part and parcel of the Constitution”).

<sup>122</sup> The only reference to deity, or other source of natural law, comes in the last substantive paragraph of the Articles. That provision, however, invokes God not as a source of law, but as inspiration to Colonial Legislatures to ratify the document: “And Whereas it has pleased the Great Governor of the World to incline the hearts of the legislatures we respectively represent in Congress, to approve of, and to authorize us to ratify the said Articles of Confederation and perpetual Union.” ARTICLES OF CONFEDERATION OF 1781, at XIII.

<sup>123</sup> U.S. CONST., Preamble (emphasis added).

origin of those rights.<sup>124</sup>

Beyond the Preamble, nothing in the text of the Constitution, including the Bill of Rights, invokes natural law or a theistic origin.<sup>125</sup> That is consistent with the Enlightenment view that positive law is the means by which society interprets, implements and enforces natural law.<sup>126</sup> Other provisions, although traditionally interpreted for other purposes, reinforce the dominance of positive law in the constitutional scheme.<sup>127</sup> Even the Bill of

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<sup>124</sup> See Douglas S. Broyles, *Have Justices Stevens and Kennedy Forged A New Doctrine of Substantive Due Process? An Examination of McDonald v. City of Chicago and United States v. Windsor*, 1 TEX. A&M L. REV. 129, 155 (2013) (identifying pronouncements by Jefferson, Adams, and Madison about religious origins of the rights the American Revolution sought to protect). Broyles quotes Alexander Hamilton in his debate with Samuel Seabury: “[N]atural liberty is a gift of the beneficent Creator . . . . Civil liberty is only natural liberty, modified and secured by the sanctions of civil society.” Alexander Hamilton, *The Farmer Refuted* (1775), reprinted in 1 *The Works of Alexander Hamilton in Twelve Volumes* 53, 87 (Henry Cabot Lodge ed., Fed. ed. 1904). He also said, “The principal aim of society is to protect individuals in the enjoyment of those absolute rights which were vested in them by the immutable laws of nature, but which could not be preserved in peace without that mutual assistance and intercourse which is gained by the institution of friendly and social communities. Hence it follows, that the first and primary end of human laws is to maintain and regulate these absolute rights of individuals.” *Id*

<sup>125</sup> The introduction to the inscription uses the standard dating reference of the time “in the Year of our Lord one thousand seven hundred and Eighty seven,” but otherwise the document lacks any reference to deity.

<sup>126</sup> See *supra* note 74 and accompanying text.

<sup>127</sup> The Supremacy Clause, U.S. CONST. art. VI, §2, primarily an instrument of federalism, see Caleb Nelson, *Preemption*, 86 Va. L. Rev. 225, 233-237 (2000), suggests that the only source of law through which judges may invalidate legislation is the Constitution. See *The Federalist* No. 78 (Hamilton). Article VI, section 3 of the Constitution, U.S. CONST. art. VI, §3, parallels the Establishment Clause in prohibiting any requirement that a judge or other federal official be a member of any prescribed religion. It also confirms that the law to which those officers are “bound by oath or affirmation” is the Constitution. The “necessary and proper” clause, U.S. CONST. art. I, §8, cl.8, in addition to ensuring that Congress has legislative authority to effectuate other powers, see *McCulloch v. Maryland*, 17 U.S. 316 (1819) (upholding congressional power to establish the Bank of the United States as necessary and proper to effectuate express powers granted in the Constitution), is an affirmative recognition of the positive law authority of Congress within those areas of law granted to the federal government. That authority was reinforced in the implementing provisions of the post-Civil War amendments. U.S. CONST. amend. XIII, sec. 2, amend XIV, sec. 5, amend. XV, sec. 2 (each authorizing Congress to enforce the rights guaranteed by

Rights, which enumerates some “unalienable rights” proclaimed in the Declaration,<sup>128</sup> includes no express reference to natural law. The only amendment in the original ten that possibly invokes natural law—and then only by inference—is the Ninth, by reference to rights not otherwise addressed in the Constitution.<sup>129</sup> Although making no explicit reference to natural law, that provision has led to modern debates about the legal source and content of those rights.<sup>130</sup>

### C. Natural Law in U.S. Jurisprudence

Notwithstanding the affirmation of positive law by “we the people,” natural law continued in U.S. jurisprudence long after ratification of the Constitution.<sup>131</sup> The two concepts were not presumptively inconsistent, especially given the constitutional vision of a federal government with enumerated powers<sup>132</sup> and a federal judiciary with limited jurisdiction.<sup>133</sup> States were free to allocate lawmaking authority in any manner consistent

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those amendments “by appropriate legislation”).

<sup>128</sup> See *supra* note 117 and accompanying text.

<sup>129</sup> “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

<sup>130</sup> See *infra* Part II.C.

<sup>131</sup> See Charles Grove Haines, *The Law of Nature in State and Federal Judicial Decisions*, 25 YALE L. J. 617 (1915-1916) (collecting and analyzing federal and state cases); Helmholz, *supra* note 21, at 424-34 (analyzing cases thematically); Bayne, *supra* note 42 (*passim*) (collecting and analyzing U.S. Supreme Court cases); *Natural Law for Today’s Lawyer*, *supra* note 40, at 494-511 (analyzing cases in various areas of law).

<sup>132</sup> See *Jacobson v. Commonwealth of Mass.*, 197 U.S. 11, 12 (1905) (federal government has no powers except those expressly conferred in the text of the Constitution, or “properly implied therefrom”).

<sup>133</sup> U.S. CONST., art. III.

with the Constitution.<sup>134</sup> This allowed state judges to develop non-constitutional and non-statutory law based on precedent and judgment given new circumstances. In the context of public resources, for example, courts modified the natural flow doctrine of riparian rights into a “reasonable use” approach that supported more intensive water use,<sup>135</sup> replaced riparian rights with prior appropriation in arid western states,<sup>136</sup> and expanded the public trust doctrine geographically<sup>137</sup> and substantively.<sup>138</sup>

That common law tradition, however, did not dictate the sources of law to decide new cases. Under natural law philosophy that prevailed into the early Twentieth Century, judges believed in universal principles from which they could deduce the “right” or “true” rule of law to apply in particular cases. Early American lawyers were schooled in this method of legal analysis through the writings of Blackstone, reinforced by American jurists such as Kent and Story.<sup>139</sup> Thus, nineteenth century state courts frequently cited

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<sup>134</sup> See *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) (“whether the law of the state shall be declared by its Legislature or by its highest court in a decision is not a matter of federal concern”).

<sup>135</sup> See Joseph W. Dellapenna, *The Evolution of Riparianism in the United States*, 95 MARQ. L. REV. 53, 81 (2011) (noting that even early American riparian rights cases did not apply natural flow doctrine absolutely); ADLER, CRAIG & HALL, *supra* note 37 at 46-47.

<sup>136</sup> See *Coffin v. Left Hand Ditch Co.*, 6 Colo. 443 (Colo. 1882); *Irwin v. Phillips*, 5 Cal. 140 (Cal. 1855); Epstein, *supra* note 69, at 2357; and *see infra* Part III.A.

<sup>137</sup> See *Carson v. Blazer*, 2 Binn. 475 (Pa. 1810) (holding that English common law rule limiting navigable rivers to those subject to the ebb and flow of the tide was not appropriate to vastly different geography of Pennsylvania, with large, navigable inland rivers such as the Susquehanna, Allegheny, Ohio, and Delaware).

<sup>138</sup> See *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709 (Cal. 1983) (holding that public trust includes ecological values as well as traditional trust purposes of commerce, navigation and fisheries).

<sup>139</sup> See Kirk, *supra* note 50, at 1039; Alschuler, *supra* note 50, at 491; Helmholz, *supra*

natural law to support their holdings.<sup>140</sup> Federal judges remained free in diversity cases to apply “universal” law to state cases rather than abiding by state precedent.<sup>141</sup> Analysts disagree, however, about the extent to which natural law was the principal authority for a holding or simply reinforced or explained the justness of positive law.<sup>142</sup>

To some degree, when judges reach common law decisions, whether they use secular natural law in their reasoning is semantic.<sup>143</sup> In his famous proclamation of legal realism, Justice Holmes opined that “the life of the law has not been logic; it has been experience.”<sup>144</sup> But even more realistically, common law judges determine whether existing precedent should apply, and

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note 70, at 401-02; Bayne, *supra* note 42, at 218; *see also*, *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 340-45 (Or. 2001) (tracing natural law in the United States to writings of Coke, Blackstone, Locke, and Kent, among others).

<sup>140</sup> *See, e.g.*, *Billings v. Hall*, 7 Cal. 1, 11 (Cal. 1857) (noting that natural law was “an eternal rule to all men, binding upon legislatures as well as others”); *Commercial Bank of Natchez v. Chamber et al.*, 16 Miss. 9, 57 (Miss. Ct. App. 1847) (describing liberty and property as “fundamental, sacred rights”); *Arnold v. Mundy*, 6 N.J.L. 1, 21 (N.J.1821) (grounding public trust ownership of common resources in “the law of nature, which is the only true foundation of all social rights,” in addition to the civil law of Europe and the common law of England); *Fisher v. Patterson*, 14 Ohio 418, 426 (Ohio 1846) (referring to “sacred rights” to which everyone was entitled); *In re Goodell*, 39 Wis. 232, 245 (Wis. 1875) (declaring that admittance of women to the state bar was “treason against” the order of nature).

<sup>141</sup> *Swift v. Tyson*, 41 U.S. 1, 12 (1842) (interpreting the Rules of Decision Act as requiring federal judges to abide only by state statutory law in diversity cases, but not decisions of state courts, and holding that the law regarding negotiable instruments is “not the law of a single country only, but of the commercial world”).

<sup>142</sup> *See* *Helmholz, supra* note 70, at 409 (quoting Justice Frankfurter as indicating that natural law language in Justice John Marshall’s opinions was “not much more than literary garniture”), 416 (arguing that natural law normally played a subsidiary role in cases to support other sources of law, rather than to oppose them).

<sup>143</sup> *See* *Smothers v. Gresham Transfer, Inc.*, 23 P.3d 333, 356 (Or. 2001) (finding that “absolute rights” are those recognized by the common law as derived “from nature or reason rather than solely from membership in civil society”).

<sup>144</sup> OLIVER WENDELL HOLMES, *THE COMMON LAW* 1 (1881).

if so how, based on a *combination* of reason and experience, tempered by what is fair or just under the circumstances.<sup>145</sup> The same is true when existing precedent offers insufficient guidance, must be modified to fit new circumstances, or when judges invoke equity to temper an inappropriately harsh result. Judges make such choices based on an understanding of human nature and societal norms or moral principles frequently asserted as natural law.

Judicial review of legislation, however, which Roscoe Pound referred to as the American version of natural law,<sup>146</sup> was more significant because of its potential to substitute the moral judgment of individual judges for policy decisions reached by an elected legislature. In *Calder v. Bull*,<sup>147</sup> Justice Iredell prevailed in the view that the Court could invalidate an *ex post facto* law on constitutional grounds but not, as Justice Chase urged, because the statute was “contrary to the great first principles of social contract.”<sup>148</sup> In *Marbury v. Madison*, Chief Justice John Marshall wrote: “It is emphatically the province and duty of the judicial department to say what the law is.”<sup>149</sup>

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<sup>145</sup> See *Natural Law for Today's Lawyer*, *supra* note 40, at 494 (quoting Judge Robert Wilkin's view that judges decide cases based on “the ever-varying circumstances of life” that “are part of man's nature and cannot be separated from his life”).

<sup>146</sup> ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 50-51 (rev. ed. 1954). See *Natural Law for Today's Lawyer*, *supra* note 40, at 497.

<sup>147</sup> 3 U.S. (3 Dall.) 386 (1798).

<sup>148</sup> Compare *id.* at 387 (opinion of Justice Chase); with *id.* at 399 (opinion of Justice Iredell rejecting the idea that courts can invalidate legislation “merely because it is, in their opinion, contrary to the principles of social justice”).

<sup>149</sup> *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

That pronouncement, however, referred to laws that violated the Constitution,<sup>150</sup> not a judge's individual view of natural law.

The Supreme Court renewed its focus on natural law in the end of the nineteenth century and the early twentieth century, during a pivotal period in the development of prior appropriation and other natural resources law.<sup>151</sup> In substantive due process opinions by Justices Field, Harlan, Brewer, and Sutherland,<sup>152</sup> however, it did so in ways that challenged the boundaries of natural law and jeopardized principles of separation of powers, most notably in a series of cases culminating in *Lochner v. New York*.<sup>153</sup> Those decisions invalidated, based on alleged violations of economic liberty such as freedom of contract, regulatory statutes adopted by federal and state legislatures.<sup>154</sup> The *Lochner*-era Court sought to constitutionalize its holdings by arguing that economic freedom was “part of the liberty of the individual protected by the

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<sup>150</sup> *Id.* at 178.

<sup>151</sup> See *infra* Part III.A regarding the influence of natural law on prior appropriation.

<sup>152</sup> See Bayne, *supra* note 42, at 228-233.

<sup>153</sup> 198 U.S. 45 (1905) (invalidating state labor law setting maximum hours); see also, *Slaughter-House Cases*, 83 U.S. 36, 86-87 (1873) (Field, J., dissenting based on the “fundamental law of the country”); 111-24 (Bradley, J. dissenting, arguing that right to choose profession is both a protected liberty interest and property right); *Bradwell v. Illinois*, 83 U.S. 130, 140-41 (1873) (Bradley, J., concurring in the judgment, arguing that women should not be admitted to law practice due to “natural” differences between the sexes as well as “divine ordinance,” and that “[t]his is the law of the Creator”).

<sup>154</sup> See David R. Driesen, *Regulatory Reform: The New Lochnerism*, 36 ENVTL. L. 603, 606, 612-14 (2006) (arguing that modern regulatory reformers share with the *Lochner* court a reliance on “economic theory with natural law origins,” and that freedom of contract was part of the liberty interest endowed by the Creator); Horwitz, *supra* note 71, at 1426 (“The hostility to statutes expressed by nineteenth-century judges and legal thinkers reflected the view that state regulation of private relations was a dangerous and unnatural public intrusion into a system based on private rights.”).

14<sup>th</sup> Amendment of the United States Constitution.”<sup>155</sup> Dissenting jurists<sup>156</sup> and legal scholars<sup>157</sup> critiqued that practice as substituting the Court’s policy preferences for those of elected legislators.

Federal judicial reliance on natural law persisted until the New Deal. In *Erie Railroad v. Tompkins*,<sup>158</sup> the Court ended the ability of federal judges to decide diversity cases on grounds other than state statutory or judicial precedent. Although also justified on statutory<sup>159</sup> and constitutional<sup>160</sup> grounds, Justice Brandeis pronounced the death of natural law as a source for federal courts to decide state common law:

The doctrine rests on the assumption that there is a “transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute,” that federal courts have the power to use their judgment as to what rules of common law are; and that in the federal courts “the parties are entitled to an independent judgment on matters of general law[.]”<sup>161</sup>

*Erie*, however, applies only to federal judicial decisions in areas of law

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<sup>155</sup> *Lochner*, 198 U.S. at 53.

<sup>156</sup> *Id.* at 74-76 (Holmes, J., dissenting) (objecting to use of the 14<sup>th</sup> amendment to substitute the court’s economic policy preference for that of the legislature); *see also*, *Tyson & Brother v. Banton*, 273 U.S. 418, 445 (1927) (Holmes, J., dissenting) (arguing that state legislative policy should not be disturbed absent violation of federal or state constitutions).

<sup>157</sup> *See supra* Part II.A.3.

<sup>158</sup> *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

<sup>159</sup> 304 U.S. at 71-73 (holding that the Rules of Decision Act requires federal judges in diversity cases to apply all state law, not only statutory law).

<sup>160</sup> *Id.* at 78-80 (finding, arguably in *dictum*, that a different construction would constitute an unconstitutional assumption of state lawmaking power by federal courts).

<sup>161</sup> *Id.* at 79. Justice Brandeis cited an earlier dissent by Justice Holmes: “Law in the sense in which courts speak of it today does not exist without some definite authority behind it. The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else . . . .” *Kuhn v. Fairmont Coal Co.*, 215 U.S. 349 (1910) (Holmes, J., dissenting).



reserved to the states under the Tenth Amendment.<sup>162</sup> Under the Supremacy Clause, state positive law cannot override federal law with respect to powers delegated to the federal government.<sup>163</sup> What, then, suggests that natural law has no legitimate role in issues of constitutional interpretation and other federal law, including the use of federal lands?

Since the New Deal, most courts<sup>164</sup> and many legal scholars,<sup>165</sup> including conservative jurists,<sup>166</sup> have asserted that natural law has been supplanted by legal positivism. Federal courts may invalidate legislation only on constitutional grounds,<sup>167</sup> and the Court rejected the idea that natural law principles of economic liberty supported constitutionally protected rights absent a clear linkage to the text of the Constitution.<sup>168</sup>

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<sup>162</sup> U.S. CONST. amend. X.

<sup>163</sup> U.S. CONST. art. VI, cl. 1.

<sup>164</sup> See, e.g., *Attar v. Attar*, 181 N.Y.S.2d 265, 267 (N.Y. Sup. Ct. 1958) (holding that the role of a judge is not to determine when natural law is supreme over positive law, but to adhere to and enforce positive law); *Industrial Trust Co. v. Pendleton*, 40 A.2d 849, 851 (R.I. 1945) (explaining that natural law rights are protected and enforced by positive law).

<sup>165</sup> See, e.g., *Natural Law for Today's Lawyers*, *supra* note 40, at 461-62 (claiming that natural law was banished “first from our law schools and then from the language of court opinions”); O’Scannlain, *supra* note 68, at 1514; Helmholz, *supra* note 70, at 402 (noting that by the end of the nineteenth century, natural law “lost its hold on the common assumptions of most lawyers”); see also, Caleb Nelson, *A Critical Guide to Erie Railroad Co. v. Tompkins*, 54 Wm. & Mary L. Rev. 921, 923 (2013) (providing a typology of sources of law before *Erie*, and critiquing the *Erie* decision).

<sup>166</sup> See *supra* note 96.

<sup>167</sup> See Helmholz, *supra* note 21, at 427-28; Wright, *supra* note 50, at 464 (arguing that, in most cases, natural law theories are too indeterminate to control constitutional law outcomes); George, *supra* note 42, at 2282 (arguing that judges lack authority to “go beyond the text, structure, logic, and original understanding of the Constitution to invalidate legislation that, in the opinion of judges, is contrary to natural justice,” and that the exercise of such authority usurps legislative power).

<sup>168</sup> *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage law for women). As Chief Justice Hughes wrote: “The Constitution does not speak of freedom of contract. It speaks of liberty and prohibits the deprivation of liberty without due

The second half of the twentieth and the early part of the twenty-first century arguably saw a return of natural law reasoning, but for different purposes. Some commentators argue that, after the horrors of World War II, a U.S. Supreme Court that had become reluctant to impute economic liberty into the fourteenth amendment<sup>169</sup> became more aggressive in striking legislation in the realm of civil rights.<sup>170</sup> Cases such as *Brown v. Board of Education*, however, were rooted in constitutional text and principles,<sup>171</sup> or in “the text, structure, logic, and original understanding of the Constitution.”<sup>172</sup> To avoid leaving substantive due process jurisprudence to the “policy preferences of Members of this [Supreme] Court,” and because “guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended,” the Supreme Court has struggled to articulate principles to

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process of law. In prohibiting that deprivation, the Constitution does not recognize an absolute and uncontrollable liberty.” *Id.* at 391.

<sup>169</sup> See Note, *State Views on Economic Due Process: 1937-1953*, 53 Colum. L. Rev. 827, 827-31 (1953) (tracing the rise and decline of the Supreme Court’s recognition of economic liberty as a protected 14<sup>th</sup> amendment right).

<sup>170</sup> See *Natural Law for Today’s Lawyer*, *supra* note 40, at 499; Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 Duke L.J. 1609, (2001); 1632-37; Jack B. Weintin, *Procedural Reform as a Surrogate for Substantive Law Revision*, 59 Brook. L. Rev. 827, 838 (1993)(discussing the success of procedural reforms in opening the courts to civil rights claims); Samuel R. Bagenstos, *Who is Responsible for the Stealth Assault on Civil Rights*, 114 Mich. L. Rev. 893, 904-05 (2016)(discussing the post-World War II judicial shift from using the 14<sup>th</sup> amendment to address economic liberty to civil rights and liberties).

<sup>171</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483, 495 (1954)(grounding decision in the equal protection clause of the 14<sup>th</sup> amendment); *see also*, *Bolling v. Sharpe*, 347 U.S. 497, 500 (1954)(rooting challenge to D.C. segregated schools in the due process clause of the 5<sup>th</sup> amendment).

<sup>172</sup> George, *supra* note 42, at 2282.

guide this inquiry without embracing the term “natural law.”<sup>173</sup>

The tension between natural law and constitutional law resurfaced in what Professor George refers to as the “Griswold problem”<sup>174</sup> regarding the scope of residual rights protected by the Ninth Amendment. Although the subject of ongoing dispute, some argue that natural law forms a key basis for the constitutional right to privacy announced by the Supreme Court in *Griswold v. Connecticut*,<sup>175</sup> and a series of liberty interests recognized by the Court in the wake of *Griswold*.<sup>176</sup> In the diverse opinions in *Griswold* itself,<sup>177</sup> the justices debated the extent to which the liberty interests protected in

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<sup>173</sup> See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997) (referring to “those fundamental rights and liberties which are, objectively, ‘deeply rooted in this Nation’s history and tradition’”, quoting *Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 503 (1977)); *Adamson v. California*, 332 U.S. 46, 65 (1947) (Frankfurter, J., concurring, invoking “those canons of decency and fairness which express the notions of justice of English-speaking peoples”); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (Cardozo, J., speaking of “a principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental” and “rights implicit in the scheme of ordered liberty”).

<sup>174</sup> George, *supra* note 42, at 2270.

<sup>175</sup> *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding unconstitutional a Connecticut law prohibiting the use of contraceptives even by married couples in the privacy of their own bedrooms, and medical services prescribing and informing patients on the use of contraceptives); see also, *Eisenstadt v. Baird*, 405 U.S. 438 (1972) (extending *Griswold* to unmarried persons); *Carey v. Population Services, Int’l*, 431 U.S. 678 (1977) (extending *Griswold* to persons under 16 years of age).

<sup>176</sup> See Harold R. Demoss Jr., *An Unenumerated Right: Two Views on the Right of Privacy*, 40 Tex. Tech L. Rev. 249, 252 (2008); HANKS ET AL., *supra* note 44, at 477-78. See *infra* Part II.C for a more detailed discussion of this debate.

<sup>177</sup> Compare *Griswold*, 381 U.S. at 484-86 (majority opinion by Justice Douglas recognizing fundamental right to privacy that emanates from the principles in the Bill of Rights) with *id.* at 486-89 (concurring opinion by Justices Goldberg, Brennan and Chief Justice Warren supporting decision based on “fundamental” rights protected by the 9<sup>th</sup> amendment even without express mention in constitutional text); *id.* at 499-502 (opinion by Justice Harlan concurring in the judgment and suggesting that statute violated basic values implicit in the concept of ordered liberty protected by the 14<sup>th</sup> amendment, quoting *Palko v. State of Connecticut*, 302 U.S. 319, 325 (1937); and *id.* at 507 et seq. (dissenting opinions by Justices Black and Stewart accusing majority of a return to natural law principles in which Justices were free to invalidate state laws based on personal beliefs and preferences).

*Griswold* were manifestations of natural law,<sup>178</sup> or were rooted in existing rights, or “penumbras”<sup>179</sup> of those rights, in the Constitution. That debate expanded as the Court reviewed the constitutionality of state laws banning homosexual relations between consenting adults,<sup>180</sup> statutes banning abortion,<sup>181</sup> statutes restricting biracial marriage<sup>182</sup> and same-sex marriage,<sup>183</sup> statutes prohibiting assisted suicide,<sup>184</sup> and others.<sup>185</sup> In parallel with the fourteenth amendment debate, scholars continue to dispute whether the Ninth Amendment is an independent source of unenumerated rights, and whether those rights can be identified by reference to natural law.<sup>186</sup> Others advocate a return to a jurisprudence in which jurists can rely on natural law sources, some religious in origin,<sup>187</sup> to safeguard fundamental rights that predated the

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<sup>178</sup> See also, Calvin R. Massey, *The Natural Law Component of the Ninth Amendment*, 61 U. of Cin. L. Rev. 49 (1992)(arguing that the one purpose of the ninth amendment, in addition to constraining federal power, is a judicially enforceable source of natural rights.)

<sup>179</sup> Although the primary definition of “penumbra” is “a space or partial illusion (as in an eclipse) between the perfect shadow on all sides and the full light,” an alternate definition is “a body of rights held to be guaranteed by implication in a civil constitution.” *Penumbra*, *Webster’s Dictionary*, (online), (2017).

<sup>180</sup> *Lawrence v. Texas*, 539 U.S. 558, 565-66 (2003).

<sup>181</sup> *Roe v. Wade*, 410 U.S. 113, 155 (1972).

<sup>182</sup> *Loving v. Virginia*, 388 U.S. 1, 2 (1967).

<sup>183</sup> *Obergefell v. Hodges*, 135 S. Ct. 2584, 2589 (2015).

<sup>184</sup> *Washington v. Glucksberg*, 521 U.S. 702, 719-20 (1997).

<sup>185</sup> See *Skinner v. Oklahoma*, 316 U.S. 535, 541-42 (1942) (recognizing right to procreate as one of the most fundamental rights of mankind); *Meyer v. Nebraska*, 262 U.S. 390, 400-01 (1923) (recognizing parent’s fundamental right in raising children).

<sup>186</sup> See, e.g., James E. Fleming, *Fidelity to Natural Law and Natural Rights in Constitutional Interpretation*, 69 *FORDHAM L. REV.* 2285 (2001) (critiquing George’s analysis of the issue and arguing that natural law continues to provide “aspirational principles” to guide constitutional interpretation); Massey, *supra* note 178 (arguing that the Ninth Amendment is a source of unenumerated rights, and that those rights can be informed by natural law).

<sup>187</sup> See, e.g., Hensler, *supra* note 44, at 153 (referring to a revival of natural law tradition for “at least the last two decades”); Kennedy, *supra* note 21, at 36, 39 (referring to a natural

Constitution.<sup>188</sup>

#### D. Conclusion

Based on this brief review of natural law, three principles are relevant to this analysis. First, natural law has never been a fixed concept. It has shifted as relevant to time, place and circumstance, from its modern roots in medieval Europe, to its transformation during the Enlightenment, to its modification in the secular state. Thus, to the extent that natural law is relevant to debates over ownership and use of public natural resources, it must be analyzed and applied in our current political and social context, not through the lens of a past era.

Second, a basic tenet of natural law is that individuals must respect and obey the positive law of the society in which they live, because that is the foundation on which all civil society is based. Even the most ardent natural law advocates have accepted that positive law is the means through which governments effectuate and enforces rules for an orderly society, whether or not the substance of those rules is grounded in natural law. Even those who advocate for changes in positive law because they violate natural law

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law revival). The source and legitimacy of natural law was also a significant issue during the confirmation hearing for Supreme Court Justice Clarence Thomas, and the unsuccessful effort to confirm Judge Robert Bork. *See* Campbell, *supra* note 107; Tribe, *supra* note 107.

<sup>188</sup> Arkes, *supra* note 21, at 1254 (arguing that those sources “were usually not mentioned in the text of the Constitution, because they were truths that had to be in place before one could even have a constitution or a regime of law”); *see also*, Heimbach, *supra* note 21; Kennedy, *supra* note 21 (approving of Justice Thomas’s implicit reliance on natural law).

(including basic human rights) must do so through lawful means, or when choosing civil disobedience as their method, must accept potential legal consequences as the price of their chosen tactic.<sup>189</sup>

Third, the Founders omitted any reference to a religiously grounded natural law in the text of the U.S. Constitution. Indeed, through both the Establishment Clause of the First Amendment and the Oath or Affirmation clause in Article IV, they prohibited the use of religion in adopting or interpreting positive law. That left the federal and state constitutions as the exclusive source of judicial review of duly adopted legislation, although it left open the possibility that judges might rely on principles associated with natural law in other contexts. Those may include common law matters or other cases not directly addressed by legislation, cases that require judges to interpret ambiguities or to fill gaps in legislation or constitutional provisions, or cases in which equitable remedies may be appropriate even in the face of legislation or other binding positive law. Scholars and jurists continue to debate the precise manner and degree to which that interpretive flexibility is legitimate or appropriate.

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<sup>189</sup> See Ledewitz, *supra* note 2, at 97 (citing *City of Chicago v. King*, 86 Ill. App. 2d 340, 230 N.E.2d 41 (1967) *cert. denied*, 393 U.S. 1028 (1969); *Commonwealth v. Averill*, 12 Mass. App. Ct. 260, 423 N.E.2d 6 (1981); *People v. Alderson*, 144 Misc. 2d 133, 147, 540 N.Y.S.2d 948, 958 (Crim. Ct. 1989); *State v. Diener*, 706 S.W.2d 582, 586 (Mo. Ct. App. 1986)). John Alan Cohan, *Civil Disobedience and the Necessity Defense*, 6 *Pierce L. Rev.* 111, 119 (2007) (recognizing that “[o]ne characteristic of civil disobedience is the recognition by its practitioner that he must face the legal consequences of his offense.”).

### III. Prior Appropriation and Natural Law

#### A. Defining the Problem

##### 1. Natural law and prior appropriation in water law

The prior appropriation doctrine of western water law, in which priority of right is assigned in the temporal order in which users divert and put water to beneficial use,<sup>190</sup> evolved in a period when natural law influenced U.S. judicial philosophy.<sup>191</sup> Prior appropriation reflected classic common law process in which courts recognized that new circumstances justified different legal rules. However, the doctrine was also root in natural law principles regarding private property.

In *Irwin v. Phillips*, the seminal California case on prior appropriation,<sup>192</sup> downstream miners asserted, against owners of a canal used by existing miners, the right to enjoy water in its free-flowing natural channel under the common law of riparian rights.<sup>193</sup> The downstream claimants were not riparian landowners; they were squatters on the public domain, hence trespassers. Thus, they had no valid claim to riparian rights, and the Court could have dismissed the case based on prevailing common law. Instead, the

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<sup>190</sup> See generally, ADLER, CRAIG AND HALL, *supra* note 37, at 121-34.

<sup>191</sup> See Eric T. Freyfogle, *Lux v. Haggin and the Common Law Burdens of Modern Water Law*, 57 U. COLO. L. REV. 485, 522 (1986).

<sup>192</sup> *Irwin v. Phillips*, 5 Cal. 140 (Cal. 1855).

<sup>193</sup> *Id.* at 145.

Court reached the same result, upholding the canal owners' diversion rights, through two related concepts.

First, the Court affirmed that the "right" of miners to prospect for gold on public land was recognized under the *custom* of the region absent action by the federal government—which owned the public domain<sup>194</sup>—to prevent them from doing so.<sup>195</sup> The opinion did not specify the source of this "right", but noted that both parties were equally situated in their status as users of public lands. The right cannot have been rooted in positive property law, under which the miners were trespassers. The natural law rationale for allowing squatting on public lands, however, stemmed from John Locke's "homestead" principle. Under Locke's theory, individuals have a natural right to acquire property by combining their labor with unassigned resources, so long as enough remains in quantity and quality for others to enjoy similar rights.<sup>196</sup> The necessary corollary is that the federal government, in "owning"

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<sup>194</sup> Unreserved federal lands were referred to as the "public domain" until the 1930s, when President Franklin Roosevelt withdrew them from entry following passage of the Taylor Grazing Act. *See* Public Rangeland Management I, *supra* note 17, at 536, 541.

<sup>195</sup> "They had the right to mine where they pleased throughout an extensive region . . ." *Irwin v. Phillips*, 5 Cal. 140, 146 (Cal. 1855). All parties admitted that "the mining claims in controversy and the lands through which the stream runs, and through which the canal passes, are a part of the public domain, to which there is no claim of private proprietorship, and that the miners have the right to dig for gold on the public lands was settled by this Court in the case of *Hicks et al. v. Bell et al.* 3 Cal. 219."

<sup>196</sup> JOHN LOCKE, THE TWO TREATISES ON CIVIL GOVERNMENT, BK. II, CH. 5, § 27 (Dec. 1689) ("Whatsoever then he removes out of the state that nature hath provided . . . he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property. It being removed from the common state nature hath placed it in, it hath by this labour something annexed to it, that excludes the common right of other men; for this labour being the unquestionable property of the labourer, no man but he can have a right to what that is once joined to, at least where there is enough, and as good, left in common for



public resources, held them for the benefit of private individuals for later appropriation, and not as a proprietor.<sup>197</sup>

Second, the Court extended this natural right of appropriation to water as well as minerals:

Courts are bound to take notice of the political and social condition of the country.... In this State the larger part of the territory consists of mineral lands, nearly the whole of which are the property of the public. No right or intent of disposition of these lands has been shown either by the United States or the State governments, and ... a system has been permitted to grow up by the voluntary action and assent of the population, whose free and unrestrained occupation of the mineral region has been tacitly assented to by the one government, and heartily encouraged by the expressed legislative policy of the other. If there are ... many things connected with this system, which are crude and undigested, and subject to fluctuation and dispute, there are still some which a universal sense of necessity and propriety have so firmly fixed as that they have come to be looked upon as having the force and effect of *res judicata*. ... So fully recognized have become these rights, that without any specific legislation conferring, or confirming them, they are alluded to and spoken of in various acts of the Legislature in the same manner as if they were rights which had been vested by the most distinct will of the law makers ....<sup>198</sup>

The court thus recognized a “right” to appropriate public resources, based on local custom and practice and justified by the “political and social condition of the country,” without any prior positive legal authority.

The Colorado Supreme Court took a similar approach<sup>199</sup> in *Coffin v.*

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others.”).

<sup>197</sup> *But see* *Hicks v. Bell*, 3 Cal. 219 (Cal. 1853) (holding the state owned gold and silver just as the British Crown did, and that the federal government held lands in the same status as private landowners, not in a sovereign capacity).

<sup>198</sup> *Phillips*, 5 Cal. at 146 (Cal. 1855).

<sup>199</sup> The law of prior appropriation in California and Colorado would later diverge, with Colorado maintaining a “pure” system in which riparian rights were no longer recognized for purposes of water use and allocation, and California retaining some aspects of both doctrines. *See Lux v. Haggin*, 69 Cal. 255 (Cal. 1886).

*Left Hand Ditch*,<sup>200</sup> a dispute between a prior appropriator and a subsequent, *bona fide* riparian landowner. Positive law in Colorado when the dispute arose<sup>201</sup> appeared to support riparian rights,<sup>202</sup> although the Court unconvincingly refuted that implication.<sup>203</sup> More importantly, the Court held that prior appropriation doctrine applied in Colorado, prior to and notwithstanding existing positive law, as a fundamental right necessitated by the arid conditions in the region:

The right to water in this country, by priority of appropriation thereof, we think is, *and has always been*, the duty of the national and state governments to protect. *The right itself*, and the obligation to protect it, *existed prior to legislation on the subject* of irrigation.

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We conclude ... that the common law doctrine giving the riparian owner a right to the flow of water in its natural channel upon and over his lands, even though he makes no beneficial use thereof, is inapplicable to Colorado. Imperative necessity, unknown in the countries which give it birth, compels the recognition of another doctrine in conflict therewith.<sup>204</sup>

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<sup>200</sup> 6 Colo. 443 (Colo. 1882).

<sup>201</sup> By the time the case reached the Colorado Supreme Court, Colorado had become a state and adopted prior appropriation in its constitution. COLO. CONST. art. XVI, § 5.

<sup>202</sup> As reported by the *Coffin* Court, one portion of the applicable Territorial statutes provided: "All persons who claim, own or hold a possessory right to any land or area of land ... when those claims are on the bank, margin or neighborhood of any stream of water, creek or river, shall be entitled to the use of the water ... for the purposes of irrigation, and making said claims available to the full extent of the soil, for agricultural purposes." Session Laws 1861, p. 67, §1." 6 Colo. at 450. Another section of the Territorial statutes provided: "Nor shall the water of any stream be diverted from its original channel to the detriment of any miner, millmen or others along the line of said stream, and there shall be at all times left sufficient water in said stream for the use of miners and farmers along said stream." Latter part of § 13, p. 48, Session Laws 1862." *Id.* at 450-51. Both provisions appear to support the prevailing doctrine in which those who hold riparian property are entitled to the use of the stream, for legitimate purposes, unimpaired by those who seek to divert water from the stream channel.

<sup>203</sup> *Id.* at 451.

<sup>204</sup> *Id.* at 446-47 (emphasis added); *see also, id.* at 446 ("But we think the [prior

Although the *Coffin* court did not expressly invoke natural law, cases on which it relied did so. In upholding an equitable interest in an easement for a jointly constructed irrigation ditch to satisfy appropriative rights, Chief Justice Thatcher wrote: “where the climatic conditions are such as exist in Colorado, the right to convey water for irrigating purposes over land owned by another is founded on *the imperious law of nature*, with reference to which it must be presumed the government parts with its title.”<sup>205</sup> In upholding an unwritten easement for an irrigation ditch against a claim that it violated the statute of frauds, however, the Court distinguished traditional natural law applicable to human morals from a form of natural law tied more closely to the law of nature:

The principles of the decalogue may be applied to the conduct of men in every country and claim, but rules respecting the tenure of property must yield to the physical laws of nature, whenever such laws exert a controlling influence.

In a dry and thirsty land it is necessary to divert the waters of streams from their natural channels, in order to obtain the fruits of the soil, and this necessity is so universal and imperious that it claims the recognition of the law.<sup>206</sup>

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appropriation] doctrine has existed from the date of the earliest appropriations of water within the boundaries of the state. The climate is dry, and the soil, when moistened only by the usual rainfall, is arid and unproductive; except in a few favored sections, artificial irrigation for agriculture is an absolute necessity.”)

<sup>205</sup> *Schilling v. Rominger*, 4 Colo. 100, 109 (Colo. 1878) (Thatcher, C.J., concurring) (emphasis added).

<sup>206</sup> *Yunker v. Nichols*, 1 Colo. 551, 553 (1872), superseded by statute as stated in *Stewart v. Stevens*, 10 Colo. 440 (1887); *see also, id.* at 555 (“When the lands of this territory were derived from the general government, they were subject to the law of nature, which holds them barren until awakened to fertility by nourishing streams of water, and the purchasers could have no benefit from the grant without the right to irrigate them.”).

Thus, both the California and Colorado courts treated water appropriation as a pre-existing right, independent of positive law. The rationale was based as much on human relationship to the natural world as on universal aspects of human relations in what was in some respects a pre-political society during western settlement. Whether this reflects a variation on natural law, or common law in which courts modified positive law to fit different geographic and hydrological conditions, is open to debate.

The U.S. Supreme Court invoked natural law more explicitly to ascertain the rights of individuals to appropriate water from public lands. In *Broder v. Natoma Water & Mining Co.*,<sup>207</sup> Justice Brewer construed a federal statute granting land rights to a railroad<sup>208</sup> as recognizing a pre-existing right to appropriate water from public lands:

It is the established doctrine of this court that rights of miners, who had taken possession of mines and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations for the purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged and was bound to protect, before the passage of the [statute]. We are of the opinion that the [Act] was rather a voluntary *recognition of a pre-existing right of possession*, constituting a valid claim to its continued use, than the establishment

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<sup>207</sup> *Broder v. Natoma Water & Mining Company*, 101 U.S. 274 (1879).

<sup>208</sup> The statute in question provided: "That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, *and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts*, the possessors and owners of such vested rights shall be maintained and protected in the same ...." *Id.* at 275 (quoting 14 Stat. 251 (emphasis added)).

of a new one.<sup>209</sup>

Like the California and Colorado Supreme Courts, the *Broder* Court did not specify the source of this pre-existing right, but it cited earlier decisions that expressly invoked the language of Locke's theory of natural property rights. In *Atchison v. Peterson*, Justice Field wrote: "And he who first connects his own labor with property thus situated and open to general exploration, does, in natural justice, acquire a better right to its use and enjoyment than others who have not given such labor."<sup>210</sup> Thus, like the California and Colorado Supreme Courts, the U.S. Supreme Court recognized "pre-existing rights" to build canals and ditches on public land, but more expressly grounded in natural law. According to the Court, Congress merely ratified those rights in subsequent positive law.

## 2. The analogy to grazing rights

Advocates of private grazing rights on public lands cite the same right of appropriation as applies to water. Falen and Budd-Falen argued that grazing preferences under the Taylor Grazing Act and laws applicable to

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<sup>209</sup> *Id.* at 276 (emphasis in original).

<sup>210</sup> 87 U.S. (20 Wall.) 507, 512 (1874) (affirming the applicability of prior appropriation to miners in the arid west in contravention of the prevailing doctrine of riparian rights). *See also*, *Jennison v. Kirk*, 98 U.S. (8 Otto) 453, 459 (1878) (describing customary law of prior appropriation in mining camps as "part of the miner's nature ... [h]e had given the honest toil of his life to discover wealth..."); *Forbes v. Gracey*, 94 U.S. (4 Otto) 762, 765-66 (1876) (Justice Miller affirming state right to tax minerals extracted from federal public domain lands because they had become private property of "the man whose labor, capitol, and skill has discovered and developed the mine and extracted the ore or other mineral product"); *Basey v. Gallagher*, 87 U.S. (20 Wall.) 670, 681-82 (1874) (re-affirming holding and natural law reasoning of *Atchison*).

National Forest lands are a form of sub-fee property right entitled to Fifth Amendment protection.<sup>211</sup> Stimpert asserted that grazing permits are a form of property entitled to procedural due process rights.<sup>212</sup> Nelson suggested that ongoing environmental problems could be resolved by clearer delineation of property rights in public land grazing.<sup>213</sup> Anderson and Hill argued that contractual or other sanctioned property interests would enhance economic efficiency of grazing resource use.<sup>214</sup> Despite the differences, several common themes run through the analysis.

First, they argue, just as settlers combined their labor with water for beneficial use in mining, growing crops, and watering livestock, ranchers grazed livestock on the public range before the federal government had a significant presence in the region, similarly entitling them to property rights.<sup>215</sup> Whether they justify those rights under classical principles of

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<sup>211</sup> Falen and Budd-Falen, *supra* note 15, at 522-24.

<sup>212</sup> Stimpert, *supra* note 15, at 509-17.

<sup>213</sup> Robert H. Nelson, *How to Reform Grazing Policy Creating Forage Rights on Federal Rangelands*, 8 Fordham Envtl. L. J. 645, *passim* (1997).

<sup>214</sup> Terry L. Anderson & Peter J. Hill, *Cowboys and Contracts*, 31 J. LEGAL STUD. 489 *passim* (2002).

<sup>215</sup> See e.g., Anita P. Miller, *America's Public Lands: Legal Issues in the New War for the West*, 24 Urb. Law. 895, 898 & n.12 (1992) (explaining effort to link property rights to graze to appropriative water rights, citing speech by rancher Wayne Hage); Stimpert, *supra* note 15, at 485-89, 494-96 (arguing that same rules of appropriation should apply to forage as to water and hard rock minerals); Falen and Budd-Falen, *supra* note 15, at 507-08, 520-21 (asserting that grazing rights arose due to prior use later recognized in federal permits, and citing 1905 report from meeting between Forest Service and stockmen asserting prior appropriation and "law of occupancy" rights to graze); see also Harbison, *supra* note 43, at 466-67, 481 (arguing that courts have held erroneously that grazing permits and leases convey no property interests because those permits convey many of the "sticks in the bundle" of traditional property rights).

natural law articulated by Aristotle, Locke and Blackstone,<sup>216</sup> as a manifestation of the rule of capture in property law,<sup>217</sup> or even under Biblical principles dating to Abraham's well,<sup>218</sup> natural law ranch advocates assert property rights similar to those recognized in water.

Second, natural law ranch advocates argue that, just as western aridity and geography necessitated prior appropriation of water, range conditions made public land grazing imperative to the success of livestock operations in the region, dating to Spanish Colonial and Mexican rule in the southwest.<sup>219</sup> As grazing economies developed, federal homesteading programs allowed settlers to acquire fee ownership, but only for parcels of limited size.<sup>220</sup> Given the acreage required to support cattle on western rangelands, an economically feasible solution was to use the acquired land as "base property," while using much larger areas of federal land for supplemental grazing.<sup>221</sup> Thus, they

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<sup>216</sup> See Nelson, *supra* note 213, at 645-47 (citing natural law theorists from Aristotle to Aquinas and arguing that Locke's theory of property may apply equally to grazing as to other property, but that the same would be true for other public land uses as well); Stimpert, *supra* note \_\_, at 484-86 (citing Blackstone), 495-96 (questioning why ranchers "were not given the full fruit of their labor"); Harbison, *supra* note 43, at 459-60 (quoting Adam Smith).

<sup>217</sup> See Donahue, *supra* note 11, at 731-37 (explaining but not agreeing with validity of analogy to rule of capture); Stimpert, *supra* note 15, at 485-87 (discussing prior appropriation as logical outgrowth of the rule of capture, leading to property rights "as a common principle of American property law").

<sup>218</sup> See Stimpert, *supra* note 15, at 484-85, 488 (arguing that property rights tied to labor date back to Abraham's well as recorded in the Bible).

<sup>219</sup> See Law of Public Rangeland Management II, *supra* note 39, at 22; Falen and Budd-Falen, *supra* note 15, at 512-28 (asserting that the federal government pledged to respect any associated property rights in the Treaty of Guadalupe Hidalgo); Stimpert, *supra* note 15, at 489-90.

<sup>220</sup> See Law of Public Rangeland Management II, *supra* note 39, at 16-22.

<sup>221</sup> See *id.* at 22-30; Law of Public Rangeland Management I, *supra* note 17, at 541-43; Donahue, *supra* note 11, at 735-36

argue, just as prior appropriation was justified based on aridity and dispersed surface waters compared to the riparian east, public land grazing was necessitated by the lower productivity of western rangeland related to those in lush regions.

Third, natural law ranch advocates assert that these imperatives of the western range led to customary practices that became—or should have become—accepted doctrine and are as entitled to retrospective legal recognition as was true for water.<sup>222</sup>

Why, then, should those resources be treated differently for purposes of enforceable property rights? In Part B, I present several reasons why the analogy is flawed, and why arguments posited on behalf of natural law ranch advocates fundamentally misconstrue key principles of natural law identified in the conclusion to Part II.

#### B. Positive Law and Public Resources

Despite the surficial appeal of the prior appropriation analogy, it does not support property rights to graze public lands. First, even if prior appropriation water law had roots in natural law, it was later ratified through

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<sup>222</sup> See Falen and Budd-Falen, *supra* note 15, at 511-22 (tracing customary grazing patterns and practices and their evolution into legally recognized grazing preferences); Nelson, *supra* note 213, at 646-49 (arguing that customary grazing practices evolved into *de facto* rights); Anderson and Hill, *supra* note 214, at 499-508 (arguing that customary range rights later were recognized as property through local custom and later positive law); Stimpert, *supra* note 15, at 488-96 (arguing that customary practices justified, but not achieve adequate recognition of property rights to graze).



positive law. By contrast, the federal government chose a different positive law for grazing rights. Second, it is unclear whether prior appropriation is a natural law or a positive law doctrine. Third, even if prior appropriation has a natural law grounding, it must be applied consistent with natural law principles.

1. The intervention of positive law

The most straightforward way to refute the prior appropriation analogy is the intervention of positive law, in which the federal government adopted, through legislation and judicial interpretation, different policies regarding the use of water and forage resources on public lands. The federal government ceded most of its water claims to the states, leaving each state free to adopt its own positive law governing water use and allocation. State positive law largely embraced prior appropriation at the constitutional, legislative and judicial levels. For grazing resources, Congress adopted a different approach in the Taylor Grazing Act,<sup>223</sup> the Federal Land Policy and Management Act,<sup>224</sup> and other statutes and regulations.

- a. *Water rights*

Although one could interpret the evolution of western water law as an example of common law process,<sup>225</sup> for purposes of this section I assume that

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<sup>223</sup> Pub. L. No. 73-482, 73d Cong. 2d Sess. (1934) (codified at 43 U.S.C. §§ 315, 316).

<sup>224</sup> See, e.g., FEDERAL LAND POLICY AND MANAGEMENT ACT, 43 U.S.C. ch. 35.

<sup>225</sup> See *supra* notes 143-145 and accompanying text.

early prior appropriation doctrine reflected natural law. Subsequent to judicial recognition of pre-existing customs and practices in the cases discussed above, however, western states embraced prior appropriation through positive law, to varying degrees relative to continued applicability of riparian rights. States did so via constitutional provisions,<sup>226</sup> legislation,<sup>227</sup> judicial action,<sup>228</sup> or a combination of the above.

More important was the manner in which federal legislation and judicial interpretations accepted state prior appropriation law. In *California Oregon Power Co. v. Beaver Portland Cement Co.*,<sup>229</sup> the U.S. Supreme Court reaffirmed the natural law origins of prior appropriation, but also embraced the role of positive law in codifying those rights. In *California Oregon Power Co.*, a riparian landowner argued that a federal land patent issued pursuant to the Homestead Act<sup>230</sup> incorporated riparian rights that protected them against water use by an appropriator.<sup>231</sup> The lower courts agreed, but the U.S. Supreme Court reversed based on the reasoning in *Broder v. Natoma Water & Mining Co.*, *Coffin v. Left hand Ditch*, and *Irwin v. Phillips*. The Court held that Congress, in authorizing federal land patents,

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<sup>226</sup> See, e.g., COLO. CONST. art. XVI, §§ 5, 6; IDAHO CONST. art. XV, §3; UTAH CONST. art. VII, § 1.

<sup>227</sup> See, e.g., Utah Code ch. 73.

<sup>228</sup> See, e.g., *Irwin v. Phillip*, 5 Cal. 140 (Cal. 1855); *Coffin v. Left Hand Ditch*, 6 Colo. 443 (Colo. 1882); *Stowell v. Johnson*, 26 P. 290 (1891); *Moyer v. Preston*, 44 P. 845 (Wyo. 1896).

<sup>229</sup> *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142 (1935).

<sup>230</sup> Act of May 20, 1862, 12 Stat. 392.

<sup>231</sup> *Beaver Portland Cement Co.*, 295 U.S. at 151-53.

acquiesced in water rights acknowledged by the western territories and states based on appropriation of water and application to beneficial use, as accepted by local custom and practice.<sup>232</sup>

The Supreme Court went further in *California Oregon Power Co.*, however, holding that Congress, in enacting section 1 of the Desert Lands Act,<sup>233</sup> affected “a severance of *all waters upon the public domain*, not theretofore appropriated, from the land itself.”<sup>234</sup> This was an immensely consequential ruling. Under the Property Clause of the Constitution,<sup>235</sup> Congress had plenary control over those lands, including their riparian water rights. Under the Court’s interpretation of section 1 of the Desert Lands Act, however, Congress relinquished its riparian water rights entirely, leaving the nature of water rights—on federal, state, or private lands—to the discretion of each state.<sup>236</sup>

The Supreme Court in *California Oregon Power Co.* retained the reasoning in *Broder* that the Desert Lands Act merely recognized existing appropriative rights.<sup>237</sup> The Court quoted *Broder* for the proposition that all

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<sup>232</sup> *Id.* at 154.

<sup>233</sup> “All surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing subject to existing rights.” Act of March 3, 1877, c. 107, § 1, 19 Stat. 377 (codified at 43 U.S.C. 321).

<sup>234</sup> *Beaver Portland Cement Co.*, 295 U.S. at 158 (emphasis added).

<sup>235</sup> U.S. CONST. art. IV, §3, cl. 2.

<sup>236</sup> *See* *Beaver Portland Cement Co.*, 295 U.S. at 163-64.

<sup>237</sup> *Id.* at 154 (“The rule generally recognized throughout the states and territories of the arid region was that the acquisition of water by prior appropriation for a beneficial use was

prior patents issued during this period were subject to this “existing servitude.”<sup>238</sup> Similarly, the Court invoked the California and Colorado Supreme Courts’ reasoning in describing the nature of the land and the essential labor deployed by settlers as justification for the holding.<sup>239</sup>

The Supreme Court invoked positive law, however, to determine whether Congress, in homestead statutes, acquiesced in the practice: “This general policy was approved by the silent acquiescence of the federal government, until it received formal confirmation at the hands of Congress by the Act of 1866....”<sup>240</sup> In extending the recognition to future patents, under all federal land disposal statutes, the Court held: “If the acts of 1866 and 1870

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entitled to protection; and the rule applied whether the water was diverted for manufacturing, irrigation, or mining purposes. The rule was evidenced not alone by legislation and judicial decision, but by local and customary law and usage as well.”)

<sup>238</sup> *Id.* at 155.

<sup>239</sup> *Id.* at 156-57 (“In the beginning, the task of reclaiming this area was left to the unaided efforts of the people who found their way by painful effort to its inhospitable solitudes. These western pioneers, emulating the spirit of so many others who had gone before them in similar ventures, faced the difficult problem of wresting a living and creating homes from the raw elements about them, and threw down the gage of battle to the forces of nature. With imperfect tools, they built dams, excavated canals, constructed ditches, plowed and cultivated the soil, and transformed dry and desolate lands into green fields and leafy orchards.”) *See also, id.* at 158 (“... the future growth and well-being of the entire region depended upon a complete adherence to the rule of appropriation for a beneficial use as the exclusive criterion of the right to the use of water. The streams and other sources of supply from which this water must come was separated from one another by wide stretches of parched and barren land which never could be made to produce agricultural crops except by the transmission of water for long distances and its entire consumption in the processes of irrigation. Necessarily, that involved the complete subordination of the common-law doctrine of riparian rights to that of appropriation.”)

<sup>240</sup> *Id.* The applicable section of the Mining Law of 1866 provided: “Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; ....” *Id.* at 154-55.

did not constitute an entire abandonment of the common-law rule of running waters in so far as the public lands and subsequent grantees therefore were concerned, they foreshadowed the more positive declarations of the Desert Land Act of 1877, which it is contended did bring about that result.<sup>241</sup> Moreover, to the extent that Justice Sutherland<sup>242</sup> cited arid western conditions and the extreme efforts necessary to wrest a living from those lands through hard labor and capital investment, he did so as an interpretive tool to ascertain the intent of Congress in adopting the Desert Land Act. He did not assert (as was true in *Broder*<sup>243</sup>) that the right of appropriation arose under natural law, and therefore, was something Congress was obligated to accept.<sup>244</sup>

The Court also adopted a positive law approach in its second major holding in *California Oregon Power Co.*, that in enacting section 1 of the Desert Land Act, Congress ceded governmental authority over water rights (in addition to federal ownership) to the states. Although the Court discussed arid western conditions to explain congressional abandonment of riparian

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<sup>241</sup> *Id.*; see also, *id.* at 159-63 (discussing authority of federal government to consent to the severance of water from the public domain, and intent to do so through legislation).

<sup>242</sup> Justice Sutherland came from Utah, a prior appropriation state.

<sup>243</sup> See *supra* at note 207 and accompanying text.

<sup>244</sup> See *Beaver Portland Cement Co.*, 295 U.S. at 156 (“For the light which it will reflect upon the meaning and scope of that provision [of the Desert Land Act] and its bearing upon the present question, it is well to pause at this point to consider the then existing situation with respect to the land and water rights in the states and territories named.”); 158 (“In the light of the foregoing considerations, the Desert Land Act was passed, and in their light it must now be construed.”)

rights, congressional severance of water from the public domain left each state free to adopt water law suitable to its circumstances.<sup>245</sup> In the federal reserved water rights doctrine, the federal government later reinforced the concept that it was, through positive law, making affirmative policy decisions about the degree to which water would be available for appropriation by private individuals. Although adopted by judicial decision rather than legislation, this doctrine held that the federal government, in reserving lands for specified uses, impliedly reserved sufficient water for the purposes of the reservation.<sup>246</sup>

Thus, the evolution of water law from the late eighteenth to the early nineteenth centuries reflected a classic evolution from natural law to positive law reasoning. Appropriative rights may have been based initially on Locke's theory of property or reflected local "custom and practice," but states retained those rights as a deliberate policy choice through judicial or legislative decisions. Likewise, federal courts held that Congress ceded control over

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<sup>245</sup> *Beaver Portland Cement Co.*, 295 U.S. at 162 (holding that the effect of severing water from the public lands was "that all nonnavigable waters thereon shall be reserved for the use of the public under the laws of the states and territories named"); 163 (clarifying that the Court's holding does not have "the effect of curtailing the power of the states affected to legislate in respect of waters and water rights as they deem wise in the public interest"); 164 (upholding "the right in each [state] to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain."). This explains the many variations of prior appropriation, and mixtures of appropriative and riparian rights, in different western states. *See* ADLER, CRAIG AND HALL, *supra* note 37, at 87-109.

<sup>246</sup> *See* *Winters v. United States*, 207 U.S. 564 (1908) (holding that the United States, in creating Indian Reservations, impliedly reserved sufficient water for the resident Tribes to live on that land).

water rights on public lands as a conscious policy choice.

b. *Grazing rights*

During the cattle boom of the nineteenth and early twentieth centuries, federal public lands not reserved for specific purposes were available for use by ranchers and others.<sup>247</sup> Those lands remained open for grazing according to local custom and practice, with the tacit consent of the federal government,<sup>248</sup> before they were withdrawn from the public domain and reserved for particular purposes.<sup>249</sup> Just as courts justified prior appropriation based on arid western conditions, they explained the need for grazing on public land based on the forage needs of large herds of livestock on lands with sparse forage, especially given the limited size of “homesteads” that ranchers could obtain in fee under federal land disposal policies.<sup>250</sup> For several reasons, however, the analogy between prior appropriation in water law and forage, and the resulting implications for property rights, is inapt.

First, even when unreserved federal lands remained open, the

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<sup>247</sup> See Public Rangeland Management I, *supra* note 17, at 548-50; Public Rangeland Management II, *supra* note 39, at 23-24, 27-29; Donahue, *supra* note 11, at 729-40; Stimpert, *supra* note 15, at 492;.

<sup>248</sup> *Buford v. Houtz*, 133 U.S. 320, 326-27 (1890).

<sup>249</sup> *Public Lands Council v. Babbitt*, 529 U.S. 728, 731-33 (2000) (regarding lands withdrawn pursuant to the Taylor Grazing Act); *Light v. U.S.*, 220 U.S. 523, 524-25, 535 (1911) (regarding lands withdrawn for National Forest reserves).

<sup>250</sup> See *Light v. U.S.*, 220 U.S. 523, 535 (common law rule “was not adapted to the situation of those states where there were great plains and vast tracts of uninclosed [sic] land, suitable for pasture”); *Buford*, 133 U.S. at 228 (noting that common law rule regarding grazing enclosures “was ill adapted to the nature and condition of the country at that time”); *Red Canyon Sheep Co. v. Ickes*, 98 F.2d 308, 311 (D.C. Cir. 1938) (noting the “sparsity of grass and forage in the region” as requiring large tracts to sustain livestock on the public domain).

Supreme Court recognized only an “implied license” to graze until Congress prohibited it: “[T]here is an implied license, growing out of the custom of nearly a hundred years, that the public land of the United States, especially those in which the native grasses are adapted to the growth and fattening of domestic animals, shall be free to the people who use them, where they are left open and uninclosed [sic], and no act of government forbids its use.”<sup>251</sup> Later cases affirmed that the United States merely “suffered” the use of public lands for grazing through tacit acquiescence, and that such acquiescence was revocable at will.<sup>252</sup>

Second, although natural law ideology might have persuaded Congress to recognize property rights in public grazing, it chose not to do so. Congress did not, in any statute analogous to the Desert Lands Act,<sup>253</sup> sever forage from public lands in the same way it did for water, or accept the appropriation doctrine as to confer property rights. To the contrary, when Congress enacted laws to govern federal land, it revoked the “implied license” to graze<sup>254</sup> and replaced it with grazing permits and leases issued by federal land managers.<sup>255</sup> In doing so, it provided expressly that grazing

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<sup>251</sup> *Buford*, 133 U.S. at 326; *see also*, *Light*, 220 U.S. at 535 (1911).

<sup>252</sup> *Omaechevarria v. Idaho*, 246 U.S. 343, 352 (1918) (finding that the “government has merely suffered the lands to be so used”); *Light*, 220 U.S. at 535 (1911) (finding only an implied license to graze that did not “deprive the United States of the power of recalling” that license); *Osborne v. United States*, 145 F.2d 892, 894-95 (9<sup>th</sup> Cir. 1944).

<sup>253</sup> *See supra* note 233 and accompanying text.

<sup>254</sup> *See Chorunos v. United States*, 193 F.2d 321, 323-24 (10<sup>th</sup> Cir. 1952) (rejecting rancher claim to use of public land without a permit).

<sup>255</sup> *See Chorunos*, 193 F.2d at 323 (10<sup>th</sup> Cir. 1951) (confirming discretionary nature of



permits convey no property rights in federal land.<sup>256</sup>

Courts have confirmed that grazing permits convey no legally cognizable property rights, and are revocable at the discretion of the federal government.<sup>257</sup> Moreover, courts upheld plenary federal authority over public rangelands under the Property Clause, first to prohibit physical enclosures and other methods used by some ranchers to monopolize public range<sup>258</sup> and later to regulate grazing on federal lands to allocate forage resources and to protect other resources.<sup>259</sup>

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permit system under Taylor Grazing Act). Others describe the mechanics of those regulations in detail. *See, e.g.*, Hillary M. Hoffmann, *A Changing of the Cattle Guard: The Bureau of Land Management's New Approach to Grazing Qualifications*, 24 J. Envtl. L. & Litig. 243, 250-80 (2009); Feller, *supra* note 39, at 563-83; The Law of Public Rangeland Management II, *supra* note 39, at 48-100.

<sup>256</sup> 43 U.S.C. §315b (“So far as consistent with the purposes and provisions of this subchapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this subchapter shall not create any right, title, interest, or estate in or to the lands.”).

<sup>257</sup> *See* United States v. Fuller, 409 U.S. 488, 493-94 (1973); United States v. Estate of Hage, 810 F.3d 712, 716 (9<sup>th</sup> Cir. 2016); Federal Lands Legal Consortium v. United States, 195 F.3d 1190, 1196 (10<sup>th</sup> Cir. 1999) (modification of grazing permits did not deny procedural due process because grazing permits confer no property interest); Diamond Ring Ranch, Inc. v. Morton, 531 F.2d 1397, 1404 (10<sup>th</sup> Cir. 1976); Chorunos, 193 F.2d at 323 (a “livestock owner does not have the right to take matters into his own hands and graze public lands without a permit”); United States v. Cox, 190 F.2d 293, 295-97 (10<sup>th</sup> Cir. 1951). *But see* Red Canyon Sheep Co. v. Ickes, 98 F.2d 308, 315-16 (D.C. Cir. 1938) (although grazing permits convey no vested property rights, they are of sufficient value to warrant equitable protection in proper circumstances); Shufflebarger v. Commissioner, T.C. 980, 992 (1955) (IRS decision that grazing preference is property for tax purposes).

<sup>258</sup> *See* McKelvey v. United States, 260 U.S. 353, 359 (1922) (upholding conviction for using force to prevent passage over federal lands); Camfield v. United States, 167 U.S. 518, 525-26 (1897) (upholding federal statute prohibiting fences and other enclosures that restrict public land access). Even before Congress adopted the Unlawful Enclosures Act, the Supreme Court rejected efforts by some ranchers to obtain monopoly control over public range resources, effectively rejecting a “rule of capture” theory of public land use and ownership acquisition. Buford v. Houtz, 133 U.S. 320, 325-26 (1888).

<sup>259</sup> *See* Public Lands Council v. Babbitt, 529 U.S. 728, 739-44 (2000) (upholding BLM regulations limiting grazing); Diamond Ring Ranch, 531 F.2d at 1401-04 (upholding federal

Ironically, both opponents<sup>260</sup> and proponents<sup>261</sup> of property rights to graze public lands agree that the unregulated implied license to graze recognized in *Buford* was not sustainable. With dramatically expanding grazing intensity in the nineteenth and early twentieth centuries, *laissez faire* policy caused widespread deterioration of public rangelands and related environmental problems, and livestock industry instability due to the resulting uncertainty about grazing rights.<sup>262</sup> In short, the public commons approach to federal land<sup>263</sup> management led to a tragedy of the commons.<sup>264</sup> During the Dust Bowl, ranchers were among the most ardent proponents of public range reform and allocated grazing.<sup>265</sup> Regardless of how one reads the history, Congress made a positive policy choice to regulate public land use. Natural law ranch advocates remain free to advocate for change in that positive law, but they have not prevailed in those policy arguments.

In the face of this positive law, the only claim available to natural law ranch advocates is that natural law *obligated* the federal government to

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authority to suspend or revoke grazing permit due to violations of regulations and permit conditions).

<sup>260</sup> See The Law of Public Rangeland Management II, *supra* note 39, at 31-32; Feller, *supra* note 39, at 560-63; Donahue, *supra* note 11, at 724-28

<sup>261</sup> See Harbison, *supra* note 43, at 468-69; Nelson, *supra* note 213, at 659-62; Stimpert, *supra* note 15, at 488-94.

<sup>262</sup> See Public Lands Council, 529 U.S. at 731-33.

<sup>263</sup> See *Buford*, 133 U.S. at 227 (referring to the public range as a “public common”).

<sup>264</sup> See Garrett Hardin, *The Tragedy of the Commons*, 162 Sci. 1243 (1968).

<sup>265</sup> See The Law of Public Rangeland Management II, *supra* note 39, at 42-47 (tracing legislative history of Taylor Grazing Act and evolution of ranchers’ position from seeking transfer of exclusive rights to acceptance of regulatory regime).

recognize property rights to graze in ranchers who labored to put federal land to beneficial use during the open access period. As discussed earlier, however, the U.S. Constitution is the supreme law of the land.<sup>266</sup> Although judges might rely on natural law to decide common law cases not otherwise addressed by positive law, to interpret constitutional ambiguities, or to apply principles of equity, natural law cannot supplant binding positive law. The only possible contrary arguments are that natural law sheds light on unenumerated rights preserved by the Ninth Amendment,<sup>267</sup> or that property rights to graze are fundamental liberty interests protected by the Fourteenth Amendment.<sup>268</sup> Even if one believes in the viability of natural law in establishing constitutional rights, however, the argument is weak here.

The strongest potential support for the natural law argument is Justice Brewer's statement in *Broder v. Natoma Mining* that congressional acceptance of prior appropriation reflected "a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one."<sup>269</sup> Given that Justice Brewer cited this rationale to explain statutory recognition of those rights, that statement is dictum at best. It was also consistent with the prevailing judicial method to

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<sup>266</sup> See *supra* note 127 and accompanying text.

<sup>267</sup> See *supra* notes 176 - 178 and accompanying text.

<sup>268</sup> See *supra* notes 153 - 155 and accompanying text.

<sup>269</sup> *Broder v. Natoma Water & Mining Company*, 101 U.S. 274, 276; see *supra* note 208 and accompanying text.

bolster positive law rulings with natural law reasoning.<sup>270</sup> More importantly, however, later statutes and judicial decisions, including the majority opinion by Justice Sutherland in *California Oregon Power*, established that Congress severed water rights from the public domain under its positive law authority in the Property Clause.<sup>271</sup> Moreover, the federal government affirmatively reserved to the states the beds and the banks of navigable waters, but not other federal lands.<sup>272</sup>

The second possible basis for property rights claims to federal grazing resources, analogous to that in *Griswold* and progeny, is that appropriative property rights arise out of other rights protected by the Constitution, or a “penumbra” emanating from those rights, under pre-existing natural law rights and principles encompassed by the Ninth Amendment.<sup>273</sup> Even without trying to resolve “the *Griswold* problem,”<sup>274</sup> this argument is weak because it is difficult to find even the penumbra underlying such a right. The Fifth and Fourteenth Amendments prohibit the federal and state governments, respectively, from taking private property without due process and just compensation.<sup>275</sup> Those protections, however, apply only to property

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<sup>270</sup> See *supra* notes 140 - 142 and accompanying text.

<sup>271</sup> See *supra* note 229 and accompanying text.

<sup>272</sup> *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845).

<sup>273</sup> See *supra* notes 176 - 178 and accompanying text.

<sup>274</sup> See *supra* note 174 and accompanying text.

<sup>275</sup> U.S. CONST. am. V, am. XIV, §1.

recognized by positive law.<sup>276</sup> Those provisions do not dictate what property rights states or the federal government must recognize, and the Supreme Court has rejected the idea that the “right” to graze on federal land is the kind of property subject to Fifth Amendment protection.<sup>277</sup> Even in the context of appropriative water rights, which are usufructuary rather than fee in nature,<sup>278</sup> courts have struggled with the degree to which those rights are entitled to takings protections.<sup>279</sup>

Moreover, the positive law in the Constitution dictates that Congress has plenary authority to “dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.”<sup>280</sup> The Supreme Court has held that the federal government holds that land in trust for all citizens, and that the courts have no authority

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<sup>276</sup> See Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 494 (2000) (asserting “[p]roperty...owes both its existence and its contours to positive law, local positive law. Property simply does not exist in the absence of state law,” and distinguishing property from individual liberty and racial equality, which are “independent of legal facts”); Frank I. Micheleman, *Property, Federalism, and Jurisprudence: A Comment on Lucas and Judicial Conservatism*, 35 Wm. & Mary L. Rev. 301, 305 (1993) (arguing that liberty is an intuitive concept and a “naturalistic” rather than “positivistic” norm, while “property cannot stand while the laws fall”); Stewart E. Sterk, *The Federalist Dimension of Regulatory Takings Jurisprudence*, 114 YALE L.J. 203, 222 (2004) (arguing that the definition of property rights has generally been left to the states, and “if state law did not create property in the first instance, then subsequent state action cannot take property.”).

<sup>277</sup> U.S. v. Fuller, 409 U.S. 488, 493 (1973).

<sup>278</sup> See ADLER, CRAIG AND HALL, *supra* note 37, at 1, 154.

<sup>279</sup> Compare *Casitas Mun. Water Dist. v. U.S.*, 102 Fed. Cl. 443 (Fed. Cl. 2011) (affirming that appropriative water rights are subject to Fifth Amendment protection, but scrutinizing the exact nature of the usufructuary property right to determine that no taking occurred) with *Tulare Lake Basin Water Storage Dist. v. U.S.*, 49 Fed. Cl. 313 (Fed. Cl. 2001) (finding that restrictions on water used imposed under the Endangered Species Act constituted a physical taking requiring just compensation).

<sup>280</sup> U.S. CONST. art. IV, §3, cl. 2.

to question policy decisions by the elected branches about the appropriate use and disposition of lands subject to that trust.<sup>281</sup> Thus, the Property Clause created a far different vision of how public lands would be held in this country, and for what purposes, relative to Crown lands in England.<sup>282</sup>

## 2. Relevance of natural law

A second response to the prior appropriation analogy is that natural law—even if applicable to grazing—does not support the claims of natural law ranch advocates. First, prior appropriation may more properly reflect positive law than natural law. Second, there is a compelling argument that natural law applies differently to forage than to water. Because natural law has evolved and been interpreted according to current societal needs and conditions,<sup>283</sup> any application of natural law must reflect the needs and interests of the American public with respect to public lands held in trust for all of them.

### a. *Applicability of natural law*

Justices Field and Miller justified prior appropriation in Lockean natural law terms.<sup>284</sup> Professor Donahue discussed water law (as well as mining law and timber law) as a manifestation of the rule of capture.<sup>285</sup> Her

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<sup>281</sup> *Light v. U.S.*, 220 U.S. 523, 537 (1911).

<sup>282</sup> *See id.* at 536 (noting that the United States does not hold property for private purposes, as might a monarch, quoting *Van Brocklin v. Anderson*, 117 U.S. 158 (1886)).

<sup>283</sup> *See supra* Part II.D.

<sup>284</sup> *See supra* note 210 and accompanying text.

<sup>285</sup> *See Donahue, supra* note 11, at 731-33.

counterpart Marc Stimpert agreed, but argued that the same principles should apply to forage resources.<sup>286</sup> Professor Richard Epstein, however, has suggested the opposite interpretation, that the natural flow doctrine of riparian rights<sup>287</sup> reflected natural law,<sup>288</sup> while the reasonable use variation of riparian rights and prior appropriation are examples of positive law, created judicially and legislatively to address different economic, environmental and other circumstances.<sup>289</sup>

Under Epstein's view of natural law as predating the state and reflecting "pre-political" rights and duties, water sources were *res commune*:<sup>290</sup> "Take a plot of land and it is yours. Stick a cup in the river, and the water you have drawn out is yours as well."<sup>291</sup> The pre-political rule allowed usufructuary water rights so long as intensity of use did not deplete the stream value for common purposes such as navigation, recreation, and fishing.<sup>292</sup> This fits squarely within Locke's theory of property. The labor needed to withdraw water from its source, combined with the water, gives

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<sup>286</sup> See Stimpert, *supra* note 15, at 488, 518.

<sup>287</sup> See ADLER, CRAIG AND HALL, *supra* note 37, at 46-47 for an explanation of the evolution of riparian rights from natural flow to reasonable use doctrine.

<sup>288</sup> See Epstein, *supra* note 69, at 2350-52.

<sup>289</sup> See *id.* at 2356-59.

<sup>290</sup> Referring to resources not owned by any individual but owned in common, as distinguished from *res nullius* resources that are not held in common, but owned by no one until reduced to individual ownership via occupation or capture. See *id.* at 2344.

<sup>291</sup> *Id.* at 2350.

<sup>292</sup> *Id.* at 2351. A "usufructuary" property right allows use but not full ownership or occupation, for example, the right to pick and eat fruit but not to "own" the tree. See *id.* at 2345. In the context of usufructuary rights, a subtler distinction is that a water source is *res commune*, while discrete amounts of water within that source are *res nullius*.

rise to usufructuary riparian property rights.<sup>293</sup> Yet Locke also admonished that this right extends only to as much as any person needs, not so far as to injure common rights to benefit from the same resource.<sup>294</sup>

Under this theory, natural law riparian rights worked well in a pre-industrial world with low population density and low-intensity water uses. Professor Epstein argues that intensified water uses, in an industrializing world with larger and denser populations, required modification of riparian doctrine via positive law (through common law decisions<sup>295</sup> or legislation and regulation<sup>296</sup>) to the “reasonable use” variation of riparian rights. Natural flow doctrine required no state intervention because water use was limited to riparian land ownership; hence the rule was self-executing or enforceable by custom.<sup>297</sup> Reasonable use doctrine required state action—via adjudication or regulation—to determine what uses were reasonable, where, and in what amounts. Likewise, Epstein identifies prior appropriation as a positive law response to the poor fit between riparian doctrine and the geographic and

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<sup>293</sup> See LOCKE, *supra* note 75, Book II, ch. 5, §§ 27, 28.

<sup>294</sup> See *id.*, §§ 31, 33. A strict libertarian analysis struggles with the extent to which individual appropriation of a common resource increases that individual’s liberty at the expense of the liberty of others to use the same resource. See NOZICK, *supra* note 69, at 174-82.

<sup>295</sup> See generally, ADLER, CRAIG AND HALL, *supra* note 37, at 46-47 (explaining the common law shift from natural flow to reasonable use doctrine).

<sup>296</sup> See generally, *id.* at 243-54 (explaining the shift to “regulated riparianism”).

<sup>297</sup> This part of Epstein’s claim may be overstated, because judicial intervention may be needed if a riparian claims another user interfered with plaintiff’s use. See, e.g., *Adams v. Greenwich Water Co.*, 138 Conn. 205, 83 A.2d 177 (Conn. 1951) (suit to enjoin city from taking water in amounts that interfered with plaintiffs’ riparian water rights).



hydrological conditions of the west, with its aridity and large distances between rivers.<sup>298</sup>

Prior appropriation, however, can also be explained as natural law. Professor Epstein delineates natural law as one in which “emergent customs and practices in the state of nature cannot be treated as a consequence of conscious deliberation and supervision by the state.”<sup>299</sup> Early prior appropriation judicial decisions relied on customary practices that evolved, absent formal state action, to allocate a scarce resource among competing users, and on rights that pre-dated formal legal creation.<sup>300</sup> Justice Field and others indicated that appropriative water rights derive from Locke’s theory of property and other natural law principles.<sup>301</sup>

Perhaps Justice Field and colleagues were simply wrong. They operated in a period dominated by natural law, and habitually justified the results they found appropriate through natural law reasoning. If Professor Epstein is correct, those jurists incorrectly explained prior appropriation by reference to natural law, when in fact they were exercising positive law judicial authority, or interpreting positive statutory law, to replace the natural

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<sup>298</sup> See *supra* Part III.A.1 (describing early prior appropriation decisions); Epstein, *supra* note 69, at 2359-60.

<sup>299</sup> *Id.* at 2343.

<sup>300</sup> See note 69 *supra* an accompanying text. The only way to avoid this conclusion is to describe the informal mining camps as a primitive form of government, but that logic would eliminate any nascent “society” as a source of natural law.

<sup>301</sup> See note 284 *supra* and accompanying text.

law doctrine of riparian rights to suit new circumstances. If so, it would eliminate the legitimacy of the argument that natural law justifies equal treatment of grazing and other public resources, that is, that appropriation of those resources similarly generated a “pre-existing right” that courts must uphold and protect. The federal government, exercising positive law authority under the Property Clause, made different policy decisions that best effectuated the public trust in public lands.

b. *Application of natural law*

A second possible explanation is equally fatal to the argument that natural law obligates the federal government to recognize appropriative rights to forage. If *both* the riparian rights and prior appropriation can be explained by natural law, there is no “universal” principle of natural law relevant to this issue, equally appropriate to all human societies and contexts, based on a single prototype of pre-political human existence. The “natural” interaction of humans with the environment, and therefore the customary, pre-political modes of resource allocation predating formal legal recognition through positive law, vary based on different environmental circumstances. This is consistent with the principle identified in Part II that natural law has not been interpreted and applied uniformly over time. Rather, through positive law, different polities adopted differing applications of natural law to suit particular conditions.

Indeed, the concepts of *res nullius*, *res commune*, and *res publica* developed as societies evolved from pre-political to political to distinguish between land and other resources held in common, but for different purposes. *Res nullius* refers to property not owned by anyone,<sup>302</sup> and therefore available to individuals to reduce to private ownership (*res privata*) through labor. This could apply to homesteading of unused land,<sup>303</sup> capture of wildlife,<sup>304</sup> or mining of hard rock minerals. *Res commune* applies to resources owned commonly for mutual benefit, such as a river under the natural flow doctrine of riparian rights, which individuals may use for specific purposes so long as they do not harm the *res* for use by others and the public at large. That made sense for rivers, from which water might beneficially be used (for drinking, watering crops and livestock, or running a mill), but where sufficient amounts must remain to support public navigation and fisheries. *Res publica* refers to resources intended for use by all, such as a public square, park, or commons. All are consistent with the evolution of property from a pre-political to a political world, in which different resources fit within each category, and different societies may decide how to allocate resources through different systems of positive law.

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<sup>302</sup> See *Toomer v. Witsell*, 334 U.S. 385, 399 (1948) (explaining principle of *res nullius* in the context of wild animals (*ferae naturae*));

<sup>303</sup> See *Scott v. Powell*, 182 F.2d 75, 81 (D.C. Cir. 1950) (explaining that land can never be *res nullius*, except for pre-societal or undiscovered land).

<sup>304</sup> See *Pierson v. Post*, 3 Cai. 175, 178-79 (N.Y. Sup. Ct. 1805).

That is exactly how the federal government, through positive law, adopted a different policy for water than for other resources. Although it is not essential to this analysis whether one agrees with those federal policy decisions, the distinctions are logical. Given the mobility of water and the fact that state law governed water use elsewhere in the state, it was logical for Congress to sever water from public lands so that all water could be managed through an integrated legal system, rather than recognizing one form of water rights on federal land and another on private land.<sup>305</sup> The federal government protected its interests in waterways by retaining ownership of the beds and banks of non-navigable waterways on federal land,<sup>306</sup> and through the federal navigational servitude on navigable waters—a doctrine that protects the *res commune* in those waterways.<sup>307</sup>

The federal government's decision to retain fee ownership in large tracts of public land reflected an equally rational decision that they were best managed as *res commune* because they are valuable to different people for different uses at various times and places,<sup>308</sup> or in some cases, as *res publica*

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<sup>305</sup> The limited exception, noted above, is the federal reserved water doctrine. *See supra* note 246 and accompanying text.

<sup>306</sup> *See PPL Montana, LLC, v. Montana*, 56 U.S. 576, 591 (2012) (confirming that the United States retains title to lands beneath non-navigable waters).

<sup>307</sup> *See U.S. v. Chandler-Dunbar Water Power Co.*, 229 U.S. 53, 63 (1913) (“All navigable waters are under the control of the United States for the purpose of regulating and improving navigation, and although the title to the shore and submerged soil is in the various states and individual owners under them, it is always subject to the servitude in respect of navigation created in favor of the Federal Government by the Constitution.”).

<sup>308</sup> Under the same logic, other public lands users could assert property interests because they reaped public land values through labor, such as hiking. *See Harbison, supra* note 43,

under particular statutory authority.<sup>309</sup> BLM manages most of those lands for multiple use pursuant to the Federal Land Policy and Management Act,<sup>310</sup> but since 1934 they have continued to be available to ranchers for public forage under the Taylor Grazing Act, with preferences to ranchers with adjacent base property, water rights, prior use and other factors.

#### IV. CONCLUSION

##### A. Refuting the Prior Appropriation Analogy

Despite its facial appeal, reliance on natural law to support political agendas, in the western public lands debate or otherwise, is misplaced and potentially dangerous. It ignores the history of U.S. jurisprudence and foundational principles of republican democracy.

The simple response to the prior appropriation analogy is that, to the extent that natural law drove the evolution of the prior appropriation doctrine in mid-nineteenth century water law, it occurred in the *absence* of positive law governing allocation of water. Through subsequent legislation or adjudication, all western states adopted various versions of appropriative water rights into their positive law, and the federal government expressly ratified state authority to do so.<sup>311</sup>

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at 459-63.

<sup>309</sup> Congress can set aside federal land as a National Park, 54 U.S.C. § 100101, a National Forest, 16 U.S.C. § 473, a National Wildlife Refuge, 16 U.S.C. § 688dd, or a wilderness area, 16 U.S.C. § 1131. The President may reserve National Monuments, 54 U.S.C. § 320301.

<sup>310</sup> 43 U.S.C. § 1731.

<sup>311</sup> See *supra* Part II.A.

Although similar natural law principles may have been applied to grazing rights, the federal government made different policy choices in positive laws governing those resources, consistent with the needs and conditions of the United States and its citizenry. Most notably, in the Taylor Grazing Act,<sup>312</sup> Congress in 1934 rejected the appropriation doctrine in favor of a permit system governing public grazing resources.

A prior appropriation approach to grazing can prevail only if those positive law enactments are superseded by principles of natural law, which is exactly what the Malheur defendants suggested in their assertion of “God-given rights.” The predominant interpretation of U.S. legal history, however, is that positive law has supplanted natural law as the means by which we establish legal rights and obligations. To the extent that courts can review positive law established by lower courts or legislatures, the federal and state constitutions become the standard against which legitimacy is judged, not abstract principles of natural law.

Even if one accepts the continuing relevance of natural law, that doctrine itself does not support the right of individuals to declare their own interpretation of natural law, leaving them free to disobey positive law. Positive law is the means by which societies establish binding rules, whether or not those rules are influenced by natural law. That is the most fundamental

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<sup>312</sup> TAYLOR GRAZING ACT OF 1934, 43 U.S.C. ch. 8a §315 et seq. (1934).

foundation on which civil society rests. If individuals or groups wish to change prevailing positive law, they must do so through lawful means, in the United States through the democratic and legal institutions established in the federal and state constitutions. Although there is a longstanding tradition of using civil disobedience to challenge existing positive law when lawful means of law reform fail, proponents of that strategy must accept the legal consequences of their actions. Otherwise, their reliance on natural law promotes anarchy rather than law.

#### B. The Public Trust Analogy

For those who prefer a more protective approach to public land management, the view that positive law has replaced natural law presents a similar dilemma. Some pro-environment scholars have argued for an inherent right to a clean environment,<sup>313</sup> or to fundamental rights to clean water<sup>314</sup> and other essential environmental resources. Most notably, the classic statement of the public trust doctrine sounds in the language of natural law.<sup>315</sup> Public

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<sup>313</sup> See, e.g., James R. May, *Symposium on Global Environmental Constitutionalism: Introduction and Overview*, 21 *Widener L. Rev.* 139, 140 (2015); Erin Daly, *Environmental Human Rights: Paradigm of Indivisibility*, (Widener Law Sch. Legal Res. Stud. Paper no. 11:05), <http://ssrn.com/abstract=1743610>.

<sup>314</sup> See, e.g., David Zetland, *Water Rights and Human Rights, The Poor Will Not Need Our Charity if We Need Their Water*, *JOHN HOPKINS WATER MAGAZINE*, July 2010, <http://water.jhu.edu/index.php/magazine/water-rights-and-human-rights-the-poor-will-not-need-our-charity-if-we-need/>; David Zetland, *Water Rights and Human Rights*, *FORBES* (Mar. 25 2010, 10:00AM) <https://www.forbes.com/forbes/2010/0412/opinions-sanitation-haiti-human-rights-on-my-mind.html>; Jernar Letnar Černič, *Corporate Obligations under the Human Right to Water*, 39 *DENV. J. INT'L L & POLY.* 303, 310-15 (2011).

<sup>315</sup> “By the law of nature these things are common to mankind—the air, running water, the sea and consequently the shores of the sea.” J. INST 2.1.1. Although codification of the

trust principles have been invoked to modify prior appropriation rights established by positive law,<sup>316</sup> and to support protection of a range of environmental resources beyond the original contours of the doctrine.<sup>317</sup> Conservative scholars have sought to restrict the public trust doctrine to its original contours in American or English positive law.<sup>318</sup>

Unless the public trust doctrine has a constitutional underpinning or

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public trust doctrine might suggest positive law notwithstanding the reference to “the law of nature,” the Institutes were simply a codification of those principles of law that had been assembled by Roman legal scholars near the end of the Roman Empire, regardless of their legal origins. See Ewa M. Davison, *Enjoys Long Walks on the Beach: Washington’s Public Trust Doctrine and the Right of Pedestrian Passage Over Private Tidelands* 81 Wash. L. Rev. 813, 813 (2006). But see, Richard A. Epstein, *How Spontaneous? How Regulated? The Evolution of Property Rights Systems*, 100 IOWA L. REV. 2341, 2343 (2015) (arguing that the public trust doctrine has been mischaracterized as being grounded in this Justinian source).

<sup>316</sup> *National Audubon Society v. Superior Court of Alpine County*, 658 P.2d 709, 734 (Cal. 1983) (holding that California prior appropriation law embodied in the state constitution and state statute must be balanced against principles derived from the public trust doctrine).

<sup>317</sup> See, e.g., Michael C. Blumm & Thea Schwartz, *Mono Lake and the Evolving Public Trust in Western Water*, 37 ARIZ. L. REV. 701 (1995) (explaining the expansion of the doctrine to address water allocation and quantity); Jack H. Archer & Terance W. Stone, *The Interaction of the Public Trust and the “Takings” Doctrines: Protecting Wetlands and Critical Coastal Areas*, 20 VT. L. REV. 81 (1995) (arguing for the use of the doctrine to protect wetlands); Anna R.C. Casperson, *Comment, The Public Trust Doctrine and the Impossibility of “Takings” by Wildlife*, 23 B.C. ENVTL. AFF. L. REV. 357 (1996) (suggesting applicability of the doctrine to protect wildlife); Ralph W. Johnson, *Water Pollution and the Public Trust Doctrine*, 19 ENVTL. L. 485 (1989) (proposing use of the doctrine to protect water quality); Ralph W. Johnson & William G. Galloway, *Protection of Biodiversity Under the Public Trust Doctrine*, 8 TULANE ENVTL. L. J. 21 (1994) (discussing utility of the doctrine to protect biodiversity); John C. Dernbach, *Taking the Pennsylvania Constitution Seriously When It Protects the Environment: Part II-Environmental Rights and Public Trust*, 104 DICK. L. REV. 97 (1999) (arguing that the public trust doctrine supports protection of Pennsylvania’s Environmental resources, citing Pa. Const. art. I, § 27). Most recently, environmentalists have advocated a public atmospheric trust to combat climate change, with mixed judicial reactions. See *Juliana v. U.S.*, 217 F. Supp. 3d 1224 (D. Or. 2016), *motion to certify appeal denied*, No. 6:15-CV-01517-TC, 2017 WL 2483705 (D. Or. June 8, 2017); *Butler ex rel. Peshlakai v. Brewer*, 2013 WL 1091209 (Ariz. Ct. App. 2013) (assuming but not deciding the public trust doctrine extends to the atmosphere, but dismissing on other grounds).

<sup>318</sup> See, e.g., James L. Huffman, *Why Liberating the Public Trust Doctrine is Bad for the Public*, 45 ENVTL. L. 337, 357 (2015).



other source in positive law, consistency requires proponents of those protections to accept that natural law might support appropriative rights to the public domain, or to explain why those assertions constitute an incorrect application of natural law. This apparent inconsistency will be the subject of a companion article.